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No. 94-1530-CFX
Status: GRANTED

Title: Things Remembered, Inc., Petitioner
v.
Anthony A. Petrarca

Docketed:
March 10, 1995

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Cundra,Steven D.

Counsel for respondent: Weisensell,John C.

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Entry	Date	Note	Proceedings and Orders
1	Mar 10 1995	G	Petition for writ of certiorari filed.
2	Apr 6 1995		Brief of respondent Anthony A. Petrarca in opposition filed.
3	Apr 12 1995		DISTRIBUTED. April 28, 1995 (Page 2)
4	May 1 1995		Petition GRANTED.
			**********
5	Jun 15 1995		Joint appendix filed.
6	Jun 15 1995		Brief of petitioner Things Remembered, Inc. filed.
7	Jul 14 1995		Brief of respondent Anthony A. Petrarca filed.
8	Jul 14 1995	G	Motion of Connecticut Bar Association, et al. for leave to file a brief as amici curiae filed.
9	Jul 26 1995		Opposition of petitioner to motion of Connecticut Bar Association, et al. for leave to file a brief as amici curiae filed.
10	Aug 1 1995		SET FOR ARGUMENT MONDAY, OCTOBER 2, 1995 (2ND CASE).
12	Aug 3 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Sixth Circuit.
13	Aug 3 1995		Record filed.
		*	Original record proceedings United States District Court for the Northern District of Ohio.
11	Aug 4 1995		CIRCULATED.
14	Aug 16 1995	X	Reply brief of petitioner filed.
15	Sep 13 1995		Motion of Connecticut Bar Association, et al. for leave to file a brief as amici curiae GRANTED.
16	Oct 2 1995		ARGUED.

1PP

Supreme Court, U.S.
FILED

941530 MAR 10 1995

OFFICE OF THE CLERK

CASE NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1994

THINGS REMEMBERED, INC.,

Petitioner

v.

ANTHONY A. PETRARCA,

Respondent

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an order of a District Court remanding a case to Bankruptcy Court on jurisdictional, not equitable, grounds is reviewable by the Court of Appeals under 28 U.S.C. § 1452(b).

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

THINGS REMEMBERED, INC.,

Petitioner,

v.

ANTHONY A. PETRARCA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

Things Remembered, Inc. ("TRI") petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit.[1]

OPINIONS BELOW

The order of the court of appeals dismissing the action for lack of jurisdiction is unreported but is reprinted in the appendix hereto ("App")

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[1] In accordance with Rule 29.1., Cole National Group, Inc. is the parent company of TRI. Cole Management Services, Inc. is the only subsidiary of TRI.

at 1a. The order of the court of appeals denying petitioner's petition for rehearing appears at App. 5a. The June 25, 1993, opinion of the bankruptcy court granting petitioner's motion to transfer venue is reprinted at App. 8a. The accompanying order is reprinted at App. 27a. The order of the district court reversing the bankruptcy court's June 25, 1993, order is reprinted at App. 31a.

JURISDICTION

The jurisdiction of the Court is timely invoked under 28 U.S.C. § 1254(1). The Sixth Circuit entered its Order dismissing the case for lack of jurisdiction on November 15, 1994. The Sixth Circuit denied of petitioner's petition for rehearing on January 12, 1995.

STATUTES INVOLVED IN THE CASE

28 U.S.C. § 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or

arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the Court of Appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a

case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed

with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

28 U.S.C. § 1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the Court of Appeals under

section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

STATEMENT OF THE CASE

In March, 1992, Anthony A. Petrarca ("Petrarca") sued Child World, Inc. ("Child World") and Cole National Corporation[2] in an Ohio state court. In the complaint, Petrarca alleged that Child World had breached leases for certain real property in Denver, Colorado, and Wichita, Kansas, and that Things Remembered, Inc. had breached a limited, conditional guaranty of the Denver lease only. The damages alleged as against TRI only (that is, the damages relating to the Denver guaranty)

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[2] TRI is successor in interest by merger to Cole National Corporation. For ease of reference, and because any liabilities of Cole National Corporation in this litigation are those of TRI, both will be referred to interchangeably hereafter as "TRI."

totalled approximately $2.8 million.

In May, 1992, Child World filed a petition under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Thereafter, as part of its bankruptcy proceedings, Child World rejected the leases specified in Petrarca's state court complaint.

On August 28, 1992, Petrarca filed an amended complaint in state court. The amended complaint added ten new counts. In those new counts, Petrarca alleged new claims relating to different guaranties of different properties in Ft. Wayne, Indiana; Lancaster, Pennsylvania; Akron, Ohio; Westland, Michigan; and Peoria, Illinois. In addition, the amended complaint added new damage claims totalling

approximately $12.3 million.

On September 25, 1992 -- i.e., less than 30 days after the filing of the amended complaint -- TRI removed the claims in the amended complaint to the United States District and Bankruptcy Courts for the Northern District of Ohio.[3] The District Court consolidated the removed case filed in that court with the removed case filed in the Bankruptcy Court. On competing motions (Petrarca's for remand and TRI's for transfer to the Child World "home" Bankruptcy Court) the Bankruptcy Court held that TRI's bankruptcy removal was

[3] As the District Court in this case observed, there is "a fair amount of confusion among the courts concerning whether notices of removal taken pursuant to 28 U.S.C. § 1452(b) are properly filed with the bankruptcy court instead of the district court," and "TRI's decision to file notices with both the district and the bankruptcy court may fairly be seen as an act of caution given the existing uncertainty." Order, August 11, 1994, at 2-3 n.1. See App. C at pp. 34a, 35a, n.1.

untimely, but that the removal to District Court was timely. Because the district and bankruptcy removals had been consolidated, the Bankruptcy Court then ordered the action transferred.

On Petrarca's appeal, the District Court reversed. The court held, inter alia, that the time for removal arose on the day that Child World filed its Chapter 11 petition (notwithstanding that on that day,[4] *none* of the new claims added by Petrarca's amended complaint had even been asserted). Accordingly, the District Court reversed the order of transfer, and remanded the case to the Bankruptcy Court for further

[4] In fact, the new claims were not asserted until three and a half months after the bankruptcy filing. In short, the district court order -- which found that the time for removal expired 90 days after the May 6, 1992 bankruptcy filing -- would require TRI to remove claims before they were asserted. This cannot, TRI submits, be the law -- and that is the basis upon which TRI appealed to the Sixth Circuit.

proceedings.

TRI timely appealed. The Sixth Circuit, finding that "[a]s a general rule, an order remanding an action to a state court from which is [sic] was removed is not reviewable on appeal or otherwise," *Order*, Sept. 29, 1994 at 1, *see* App. D, ordered TRI to show cause why the appeal should not be dismissed. After that show cause Order was briefed, the Sixth Circuit dismissed the appeal (without addressing the merits[5]), citing two reasons.

First, the Sixth Circuit held that the District Court's ruling on the removal to the District Court (i.e.,

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[5] The Sixth Circuit's Order to Show Cause directed the parties to brief only the issue of appealability, not the substantive issue upon which the appeal was taken. Accordingly, the Sixth Circuit did not consider TRI's argument that the District Court had miscalculated the removal period.

that it was untimely) was not appealable by virtue of 28 U.S.C. § 1447(d). Second, the Sixth Circuit held that the District Court's ruling on the bankruptcy removal was likewise not appealable, this time on authority of three cases from the Courts of Appeal and one from this Court. The Sixth Circuit did not address the contrary authority, or the distinction in 28 U.S.C. § 1452(b) between equitable and other remand orders.

REASONS FOR GRANTING THE PETITION

I. APPEAL OF AN ORDER REMANDING A CASE REMOVED PURSUANT TO 28 U.S.C. § 1452(a) IS NOT BARRED IF THE ORDER OF REMAND IS ON JURISDICTIONAL GROUNDS

A. There Is a Direct Conflict in the Circuits on This Important Issue

There is a direct and indubitable conflict among the circuits as to the issue of this case. Five circuit Courts

of Appeal have squarely addressed or squarely decided the question of whether appeal may be had from an order remanding a case on purely jurisdictional grounds, or whether such an appeal is barred by 28 U.S.C. § 1452(b). The court below, following the Seventh and Fifth Circuits, held that *any* remand from a District to a Bankruptcy Court, on whatever grounds, is not appealable to the Court of Appeals or otherwise under 28 U.S.C. § 1452(b).

The Third and Eleventh Circuits hold precisely to the contrary. The circuits hold that the plain language of 28 U.S.C. § 1452(b) can only be read to prohibit remands which are made "on any equitable ground," and that *jurisdictional* remands, like the one in this case, are always reviewable.

That this issue is an important one is clear: it is a "well-established principle that a court will not construe a statute to restrict access to judicial review unless Congress manifests its intent to do so by 'clear and convincing evidence'." South Windsor Convalescent Home, Inc. v. Mathews, 541 F.2d 910, 914 (2d Cir. 1976) (quoting Johnson v. Robison, 415 U.S. 361, 373-74 (1974)). There is no such "clear and convincing evidence" to support the ruling here. In fact, the cases which prohibit appeals of jurisdictional remands rely on something other than the plain language of the statute -- and that reliance is not permitted to a court. E.g., Connecticut National Bank v. Germain, 112 S.Ct. 1146 (1992).

This Court should grant the petition to resolve this conflict. If

it does, TRI will argue that the Third and Eleventh Circuit holdings are correct, for the reasons set forth in this brief.

B. The Plain Language of the Statute Bars Appeals Only of Equitable Remands

Section 1452(b) governs removal of claims related to bankruptcy cases. Subsection (a) authorizes removal of both cases *and claims*. Subsection (b) governs remand of those cases or claims:

> The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered *under this subsection* remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the Court of Appeals . . .

(emphasis added). By its plain terms, subsection (b) comprehends remands on

equitable grounds -- e.g., grounds relating to whether the District Court should or must abstain under 28 U.S.C. § 1334(c) -- pursuant to which a court, *in its discretion,* determines whether a "related to" action should be heard in the federal or state court.

By explicit reference to "any equitable ground," the statute carves out remands on other grounds -- it cannot be read otherwise. A jurisdictional remand, like the one at issue here, is not a matter for a court's discretion: either there is jurisdiction or there is not. The District Court below found jurisdiction lacking (because it held the removal untimely), but the District Court did not address any of the abstention or other issues urged by Petrarca in his

motion to remand.[6]

C. The Cases Relied Upon by the Court Below Are Not in Accord With the Plain Language of the Statute

Thus, the nonreviewability bar of § 1452(b) -- which prohibits appeals *only* of remands entered "under this subsection" (which can only mean remands on "any *equitable* ground") does not apply. And this was the precise holding of *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984). *Pacor* held that "Section 1478(a) [the predecessor to § 1452(a)] authorizes a very

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[6] As the lower bankruptcy court found, issues of abstention and remand should be addressed by the "home" bankruptcy court. The proper role of the "conduit" bankruptcy court is simply to transfer to the "home" bankruptcy court, which will be "more familiar with the pending bankruptcy case and what would be required for efficient administration." Memorandum of Decision on Motion to Remand and Motion to Transfer Venue, June 25, 1993, pp. 3, 4, see App. C at p. 23a, 24a. See also In re Aztec Industries, Inc., 84 B.R. 464 (Bankr. N.D. Ohio 1987).

different type of removal than does section 1441," 743 F.2d at 991, and that the general removal provisions could not and should not be applied to bankruptcy removals, 743 F.2d at 991-92. It then read the nonreviewability bar of § 1478(b) by its plain language: i.e., that remands on *equitable* grounds were not reviewable. Since the *Pacor* District Court had held that the original suit was not "related to" bankruptcy proceedings, and thus that it lacked jurisdiction, the Third Circuit accepted jurisdiction over the appeal. Accord, In re *National Developers, Inc.*, 803 F.2d 616, 619 (11th Cir. 1986) (adopting the reasoning of *Pacor* and *Browning v. Navarro*, 743 F.2d 1069, 1076 n.21 (5th Cir. 1984)); *see also National City Bank v. Coopers and Lybrand*, 802 F.2d 990 (8th Cir. 1986) (declining to

hear appeal of remand order based on lack of federal question jurisdiction under § 1331, but accepting appeal jurisdiction over remand of bankruptcy removal).

The court below did not address the *Pacor* distinction between "equitable" remands and other remands. Rather, it simply held that appellate review of a § 1452 remand is barred, and then cited to four cases, without citing or addressing the contrary authority.

Of those four cases, *Hernandez v. Brakegate*, 942 F.2d 1223, 1225-26 (7th Cir. 1991) contains the most in-depth analysis. *Hernandez* held that remands under 28 U.S.C. § 1447(c) are not reviewable (because of § 1447(d)), and that § 1452 remands are still subject to the nonreviewability bar of § 1447(d). As to the statutory distinction drawn by

Pacor between remands "under this subsection" and other remands, the Seventh Circuit found it to be "clever rather than correct," 942 F.2d at 1225. After discussing the various policy reasons why, in its opinion, even matters of jurisdiction should be nonreviewable, the court then reformed the language used by Congress: "'Equitable' in § 1452(b) makes more sense if it means 'appropriate.'" 942 F.2d at 1226.

The other case cited by the Sixth Circuit which squarely considers, and rejects, the statutory language is *Sykes v. Texas Air Corp.*, 834 F.2d 488 (5th Cir. 1987). Like *Hernandez*, *Sykes* recognized the distinction in the statute but declined to give it effect, calling it "a sort of semantic crack in the statute," 834 F.2d at 490.

The Sixth Circuit also followed its own precedent, *Boone Coal and Timber Co. v. Polan,* 787 F.2d 1056 (6th Cir. 1986). *Boone Coal* rejected *Pacor,* instead finding a line of Fifth Circuit cases more persuasive, including, primarily, *Browning v. Navarro,* 743 F.2d 1069 (5th Cir. 1984).

The Browning case was undeniably germane authority for the *limited* proposition that equitable remands are non-reviewable. But *Browning* also recognized and endorsed the distinction between reviewability of remands on equitable grounds, and of those based on jurisdictional grounds, which had been drawn by the Third Circuit in *Pacor*:

> Nonreviewability extends only to the discretionary decision to remand or not to remand a properly removed action, not to whether the Bankruptcy Court originally had jurisdiction over the

> matter. . . There is no dispute in the instant case that the Bankruptcy Court had jurisdiction to act and the manner in which it acted is not subject to our review. In *Pacor* . . the Third Circuit held that, § 1478(b) [the predecessor to § 1452(b)] notwithstanding, it could review a remand order when the Bankruptcy Court [believed that it] lacked jurisdiction under § 1471(b) [now § 1334] because the removed proceeding was not "related to" bankruptcy. In contrast, the instant action involves a decision by the Bankruptcy Court, having jurisdiction and in the exercise of its discretion, to remand the 1979 case.

Browning, 743 F.2d at 1076 n. 21 (emphasis added).[7] Thus *Browning* acknowledged the *Pacor* distinction which was simply ignored by the Court in *Boone*

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[7] The quoted language of Browning was disavowed in Sykes v. Texas Air Corporation, 834 F.2d 488 (5th Cir. 1987) but of course Sykes had not been decided at the time of Boone Coal, and, as set forth in the text infra, Sykes is open to question as to its continued validity.

Coal, and properly determined that it could not review an order of remand based on equitable considerations.

Finally, the order below cited *United States v. Rice*, 327 U.S. 742, 752 (1946). That case involved a state court petition for administration of the estate of a restricted Indian member of the Five Civilized Tribes in Oklahoma and a claim of interest in certain lands in connection therewith. Such petitions were governed by the Act of April 12, 1926, which, inter alia, gave the United States the right to intervene and remove.

The United States did so. The District Court then dismissed the complaint in intervention, and remanded the case to state court for want of jurisdiction. The question before this Court was whether the Court of Appeals

could review that remand by mandamus. This Court held that no such review was available, observing that the Act of 1887 (i.e., the predecessor to 28 U.S.C. § 1447(d)) was "intended to be applicable not only to remand orders made in suits removed under the Act of 1887, but to orders of remand made in cases removed under any other statutes, as well." 327 U.S. at 752.

For two reasons *Rice* is not on point. First, the Act of 1926 did not contain any "provisions respecting remand or any mode of review of an order of remand." 327 U.S. at 748. Given the statutory silence as to remand or review of remand, it was necessary to look to the more general removal statute to fill in the gaps. Second, § 1452 did not exist at the time *Rice* was decided.

D. Cardinal Canons of Statutory Construction Require that the Plain Language of the Statute be Given Effect; § 1447(d) Does Not Bar Appeal of Bankruptcy Remands

The *Hernandez* and *Sykes* interpretations are contrary to standard canons of statutory construction. If a statute has a "semantic crack," it may be the job of Congress to fix it, but the job of the courts is to apply it as written, crack or no:

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

Connecticut National Bank v. Germain, 112 S.Ct. 1146, 1149 (1992).

Nor is it correct to say, as the *Hernandez* court did, that Congress could not have meant "equitable" because there

is no longer a law/equity distinction.

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Morissette v. United States, 342 U.S. 246, 263 (1952); *see also United States v. Shabani*, 63 U.S.L.W. 4001, 4002 (1994) (it is a settled principle of statutory construction that Congress intends, absent contrary indications, to adopt the common law definition of statutory terms).

Moreover, the legislative history

shows that Congress could not have intended that §§ 1441-1447 apply to the § 1452 removals. Clearly §§ 1441-1447 were inapplicable to bankruptcy removals before *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); when Congress re-enacted § 1478 as § 1452 it could not have intended to change that circumstance, *see Pacor, Inc. v. Higgins*, 743 F.2d at 991-92 nn. 11,12,13.

In short, though the Hernandez court thought that "appropriate" was a more sensible word in the context, Congress did not use the word "appropriate." It used the word "equitable," which does not mean "jurisdictional."

And other rules of statutory construction also militate in favor of the Pacor interpretation and against the Hernandez line. An interpretation of § 1452(b) which reads it as prohibiting all appeals of remand orders, whether on "any equitable ground" or on a jurisdictional ground, would render § 1452(b) superfluous and wholly circumscribed by § 1447(d): if review of any remand order is never allowed under the latter statute, there is no reason for the bar of the former. No statutory provision should be construed to be entirely redundant, Kungys v. United States, 108 S. Ct. 1537, 1550 (1988), and interpretation that renders a statute superfluous should be avoided where possible, Thomas Jefferson University v. Shalala, 114 S. Ct. 2381, 2396 (1994).

CONCLUSION

For the reasons stated herein, this Court should review this case in order to resolve this conflict in the lower courts and to address the statutory distinction between equitable and jurisdictional remands in the context.

Respectfully submitted,

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March, 1995

APPENDIX A

No. 94-3980
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Entered: November 15, 1994

ANTHONY A. PETRARCA,

Plaintiff-Appellee,

v.

THINGS REMEMBERED, INC.

Defendant-Appellant.

ORDER

Before: MARTIN and BATCHELDER, Circuit Judges; and ENSLEN, District Judge.*

This action, initially filed in the Court of Common Pleas of Summit County, was removed by defendant pursuant to 28 U.S.C. §§ 1441 and 1452. Finding that the notices of removal were not timely filed, the district court remanded the action to state court. Defendant filed

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*The Honorable Richard A. Enslen, United States District Judge for the Eastern District of Michigan, sitting by designation.

a notice of appeal of the remand order. In response to a show cause order issued by the court, defendant argues that the remand order is reviewable on appeal. Plaintiff asserts that the court lacks jurisdiction to consider the appeal.

As a general rule, an order remanding an action to a state court from which it was removed "is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). Defendant argues that this general prohibition against appellate review is not applicable because this action was removed and remanded pursuant to the bankruptcy removal statute, 28 U.S.C. § 1452. The record clearly demonstrates that defendant sought removal pursuant to the general removal statute and that the district court held that the notice of removal was not filed within the time

required by 28 U.S.C. § 1446(b). Thus, section 1447(d) prohibits review of that ruling. *See Ohio v. Wright*, 992 F.2d 616, 618-19 (6th Cir. 1993); *Baldridge v. Kentucky-Ohio Transportation, Inc.*, 983 F.2d 1341, 1343-50 (6th Cir. 1993). In addition, the district court held that the notice of removal pursuant to section 1452 was not timely filed. Appellate review of that ruling is likewise barred. *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1225-26, (7th Cir. 1991); *Sykes v. Texas Air Corp.*, 834 F.2d 488, 590-91, (5th Cir. 1987); *Boone Coal and Timber Co. v. Polan*, 787 F.2d 1056, 1060, (6th Cir. 1986); see *United States v. Rice*, 327 U.S. 742, 752 (1946).

It is therefore ORDERED that the appeal is dismissed *sua sponte* for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

/s/

Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 532
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Filed: January 12, 1995

Mark A. Gamin
Thompson, Hine and Flory
629 Euclid Avenue
Suite 1100 National City Bank Building
Cleveland, OH 44114

RE: 94-3980
Petrarca vs. Things Remembered
District Court No. 93-01582

Dear Mr. Gamin:

Enclosed is a copy of an order which was entered today in the above styled case.

Very truly yours,

/s/
Leonard Green, Clerk
(Mrs.) Peggy Eshman
Administrative Assistant

Enclosure

cc:
Mr. John C. Weisensell

No. 94-3980
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Entered: January 12, 1995

IN RE: CHILD WORLD, INC.

ANTHONY A. PETRARCA,

Appellee,

v.

THINGS REMEMBERED, INC.

Appellant.

ORDER

BEFORE: MARTIN and BATCHELDER, Circuit Judges; and ENSLEN,* District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having

*Hon. Richard A. Enslen, United States District Judge for the Western District of Michigan, sitting by designation.

requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

Entered: June 25, 1993

IN RE:	)	ADVERSARY
	)	PROCEEDING
	)	92-5207
ANTHONY PETRARCA	)	
	)	
Plaintiff	)	RELATED CASE
	)	CHILD WORLD,
v.	)	INC. CHAPTER
	)	11 PENDING IN
	)	THE BANKRUPTCY
CHILD WORLD, INC.	)	COURT FOR THE
et al.	)	SOUTHERN
	)	DISTRICT OF
Defendant	)	NEW YORK
	)	CASE NO. 92
		B20 887(HS)

MEMORANDUM OF DECISION ON MOTION TO REMAND A MOTION TO TRANSFER VENUE

Before this court is a motion filed by plaintiff Anthony A. Petrarca ("Petrarca") to remand this action to state court. Also before this court is a motion by defendant Things Remembered, Inc. ("TR") for transfer of venue to the

U.S. Bankruptcy Court, Southern District, New York. A pre-trial conference was held on these motions and no hearings were requested by the parties and the court finds counsel has waived any request for a hearing. Upon review of the record and pleadings, this court concludes that the removal was proper and the motion for transfer of venue shall be granted. This court shall defer all other issues to the Bankruptcy Court, Southern District, New York.

Before discussing the applicable law, a brief review of the background of this proceeding is necessary.

TR and Child World, Inc. ("Child World") jointly filed a notice of removal in this court and the U.S. District Court, Northern District of Ohio, on September 25, 1992, on an

action pending against them in the court of Common Pleas, Summit County, Ohio, being titled Petrarca v. Child World, Inc. et al., Case No. CV-92-03-1069 (the "State Action").

Prior to the removal, on March 18, 1992, Petrarca commenced the State Action against Child World and Cole National Corporation ("Cole"). TR is a successor, by merger, to Cole. The basis of the State Action relates to Child World's alleged breach for failure to pay rent under two commercial lease agreements. The parties to the leases are Petrarca and Child World. The State Action also seeks payment from Cole based upon an alleged guaranty of the performance of Child World under the leases. Child World filed for protection under chapter 11 of the U.S. Bankruptcy Code on May 6, 1992 in the

U.S. Bankruptcy Court, Southern District, New York.

On August 28, 1992 Petrarca filed its first amended complaint (the "amended complaint") in the State Action. (See, Exhibit D to Motion to Remand). The amended complaint indicates that Child World had filed for chapter 11 protection and also alleges additional lease claims against Child World and TR.

The leases in the State Action have been rejected in the Child World Bankruptcy case pursuant to applicable bankruptcy law.

In the State Action, TR also filed a motion to dismiss Petrarca's amended complaint or stay proceedings related thereto until the Bankruptcy Court, Southern District, New York, has determined the extent of Child World's

obligations, as tenant, under the leases.

Also pending, from the District Court file records, is a motion filed by National Fire Insurance Company of Hartford to intervene in this proceeding.

On March 8, 1993, TR and Colfax Manor Gardens, a counterclaim defendant, filed a stipulated notice of dismissal which dismissed a third party complaint filed against Colfax Gardens.

On March 26, 1993, the removal action pending in District Court was transferred and consolidated with the removal filed in this court. Although other motions have been filed, this court will only address whether the removal of this action was proper in order to confer jurisdiction on this court.

This court has reviewed the decision of Judge Speer in re Aztec Industries, Inc., 84 B.R. 464 (Bankr. N.D. Ohio 1987) and finds the facts similar to this case and also finds his reasoning persuasive. In Aztec a state action was removed to the bankruptcy court and a motion to transfer the removed case to the bankruptcy court in Oklahoma was filed. Judge Speer determined that he was required to review the jurisdictional issues only. The action was found to be properly removed and the motion to transfer was granted. Judge Speer noted that the "home" bankruptcy court in Oklahoma was more familiar with the pending bankruptcy case and what would be required for efficient administration. Judge Speer followed the rationale of a similar case and stated:

> the proper role of the "conduit" court was to transfer the action to the "home" Bankruptcy Court to decide the issue of whether to remand or abstain from hearing the action.

Id. at 467 citing In re Convent Guardian Corp., 75 B.R. 346, 347 (Bankr. E.D. Pa. 1987).

This court agrees with Judge Speer and, accordingly, will only address the issue of removal to determine if this court has proper jurisdiction of this matter.

Petrarca contends the State Action should be remanded because this case was wrongfully removed to this court. Petrarca also requests this court order TR to pay its costs and fees as a result of the alleged wrongful removal.

Petrarca contends the removal was improper because: (1) it was not timely filed; and (2) TR has waived its right

to removal because it filed permissive offensive counterclaims and crossclaims.

Although TR indicates it "attempted to be as concise as possible" it has submitted an exhaustive 38 page memorandum in opposition to the motion to remand. In its effort to be concise, TR has included string cites for fundamental propositions of law, many of these string cites exceed one page. See, eg. pp. 9-10; pp. 15-16. TR also states Petrarca's 27 page memorandum in support exceeds the 15 page limit of Local Rule 8:8.1(f). TR was granted leave to file its 38 page memorandum. This court takes note that Petrarca's memorandum exceeds the 15 page limit without court approval. However, after reviewing both memoranda, this court's only comment is that if the 15 page limit was observed by both sides, all

parties to this action would have been better served by their counsel.

The Removal to District Court

TR contends it timely removed the State Action to District Court because it did not become removable until after the amended complaint was filed on August 28, 1992.

28 U.S.C. §1446(b) states, in relevant part:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

TR contends it received the amended complaint on August 31, 1992, which contained ten additional counts on additional lease guaranties which required the application of federal bankruptcy law. Thus, TR states, its removal filed on September 25, 1992 was within the 30 day period under §1446(b).

This court agrees with TR. The court has reviewed the original complaint and the amended complaint (Notice of Removal, Exhibits 1 and 27) and finds that the parties are the same and the only change in the amended complaint is the addition of ten claims based on other leases and guaranties between the parties. The new claims against TR address additional leases and also indicate that Child World is operating under federal bankruptcy law protection. The claims are state law

claims, but, because they involve lease rejection and guaranty claims, they are specifically and exclusively addressed in the bankruptcy code. Thus, it is the opinion of this court that the action became removable to District Court upon the service of the amended complaint which indicated Child World had filed a petition in bankruptcy. Thus, the notice of removal filed on September 25, 1992 in the District Court was timely under §1446(b). Striff v. Mason, 849 F.2d 240, 244 (6th Cir. 1988) (an action may be removed "where the real nature of the claim asserted in the complaint is federal, irrespective of whether it is so characterized"); E.W. Bowman, Inc. v. Norfolk and Western Railway Co., 403 F. Supp. 389, 390 (W.D. Pa. 1975) "([federal] question must appear in plaintiff's complaint by direct and

positive allegations or by necessary implication from the matters alleged").

The Removal to Bankruptcy Court

Federal Rule of Bankruptcy Procedure ("Rule") 9027 addresses removal actions and provides, in relevant part:

> (2) TIME FOR FILING; CIVIL ACTION INITIATED BEFORE COMMENCEMENT OF THE CASE UNDER THE CODE. If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under § 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order of for relief.

Rule 9027(a)(2).

Petrarca contends the removal to this court was outside the 90 day time

period and, therefore, must be remanded. This court agrees that the removal to this court was untimely. In reviewing Rule 9027, it appears that the 90 day time limit is the only provision applicable to this case. There is no indication before this court that an applicable order for relief from stay was entered or that a chapter 11 trustee has been appointed in the Child World case. The State Action was initiated before the bankruptcy filing of Child World on May 6, 1992, thus, the removal had to be filed no later than 90 days thereafter, which is August 5, 1992. However, the notice of removal was filed on September 25, 1992 in this court, clearly beyond the time limit. Thus, this court finds the bankruptcy removal is untimely.

However, because the removal was timely filed in the District Court, as stated earlier, and subsequently consolidated with the pleadings filed herein, this court finds that TR has filed a timely removal.

Petrarca also argues that TR has waived its right to remove this action by filing permissive offensive counterclaims and crossclaims in the state court. TR responds that it could not have waived its right to removal when it filed the counterclaims and crossclaims on June 26, 1992, because it had no right to remove until the amended complaint was later filed and served August 31, 1992.

This court agrees with TR's position. Petrarca argues that a waiver of a right to removal occurs when a defendant files a permissive pleading

seeking affirmative relief and cites in support, inter alia, Bedell vs. H.R.C. Ltd., 522 F. Supp. 732 (E.D. Ky. 1981).

In Bedell the court explained that a defendant may waive its right to remove an action by taking certain acts in state court that are deemed to constitute a submission to its jurisdiction. 522 F. Supp. at 737. Such acts may include the filing of a permissive crossclaim. Id. Other acts that could result in a waiver of the right to remove are the filing of pleadings seeking affirmative relief resulting in an adjudication on the merits of an issue which could result in the dismissal of the action in whole or in part. Id. at 738.

This court does not disagree with the holding in Bedell but does find another case cited more instructive.

The court in Bolivar Sand Company, Inc. v. Allied Equipment, Inc., 631 F. Supp. 171, 172 (W.D. Tenn. 1986) explains that a right to remove can only be waived by actions of the defendant after the case clearly becomes removable. See also Johnson v. Celotex Corp., 701 F. Supp. 553, 554 (D.Md. 1988).

Accordingly, in the context of this case, because TR's right to remove the state court action on federal question grounds did not arise until August 31, 1992 (the date on which it first received a copy of Petrarca's amended complaint), very simply, whatever TR or Child World did prior to that date could not possibly have constituted a waiver of the right to remove this action.

This court finds that TR did not waive its right to remove this action and removal was proper. Therefore, this

court finds it has jurisdiction to consider the motion to transfer venue. Furthermore, as this court finds that removal was proper Petrarca's motion for costs and fees incurred as a result of removal shall be denied.

Motion to Transfer Venue

TR requests this court transfer this proceeding to the Bankruptcy Court in the Southern District of New York, where the Child World case is currently pending. TR relies on Aztec, supra, and Dunkirk Limited Partnership v. TJX Companies, Inc., 139 B.R. 643 (N.D. Ohio 1992).

This court agrees with the holding in Aztec that this action should be transferred to the "home" bankruptcy court in New York. As discussed earlier, this court finds this action was properly removed and thus,

jurisdiction is proper to consider the motion to transfer venue.

Accordingly, this court adopts the sound reasoning of Judge Speer in Aztec at page 467:

> In addition, the Court which would try the case can better evaluate all the interests involved, and determine its own expertise in the particular areas of the law which form the basis of the action, as well as its own scheduling and time constraints. This [conduit] Court's speculation on these matters would not be an adequate substitute for a knowledgeable determination based upon the actual facts and circumstances. Moreover, allowing the Oklahoma Court to rule on the remand issues minimizes the potential conflicts which could arise due to differences in controlling authority between the Courts. Accordingly, a final ruling on the venue issues, and the many sub-issues which have been raised within the context of venue, remand, and abstention, should be left to the "home" Bankruptcy Court in Oklahoma.

This court also finds Dunkirk persuasive authority wherein Judge Battisti enforced a stay of a removed state action based upon a lease dispute. The Dunkirk court held that allowing the action to go forward in state court "would be contrary to federal policies designed to reach just and efficient results by bringing together as much as possible litigation affecting a bankrupt estate". Id. at 647.

Therefore, based upon the foregoing, this court shall enter a separate order denying Petrarca's motion for costs and fees and granting the motion of Things Remembered to transfer venue to the Bankruptcy Court for the Southern District of New York.

June 25, 1993 /s/
H.F. WHITE
Bankruptcy Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 1993 a copy of the attached Memorandum of Decision on Motion to Remand and Motion to Transfer Venue was sent by first class mail to each of the parties listed below.

/s/
Terri Hawkins
Chapter 11 Case
Administrator

Patricia L. Taylor/Mark A. Gamin
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Brouse & McDowell
500 First National Tower
106 South Main Street
Akron, Ohio 44308-1471
Counsel for Child World, Inc.

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

Entered: June 25, 1993

IN RE:	ADVERSARY PROCEEDING 92-5207
ANTHONY PETRARCA Plaintiff	
v.	RELATED CASE CHILD WORLD, INC. CHAPTER 11
CHILD WORLD, INC., et al.	PENDING IN SOUTHERN DISTRICT OF NEW YORK CASE NO. 92 B20 887(HS)
Defendant	

ORDER GRANTING MOTION TO TRANSFER VENUE AND DENYING MOTION FOR COSTS AND FEES

Based upon the "Memorandum of Decision on Motion to Remand and Motion to Transfer Venue" entered by this court on the 25th day of June, 1993;

It is the order of this court that the motion for costs and expenses related to the removal of this action filed by Anthony A. Petrarca is DENIED;

It is the further order of this court that the motion filed by Things Remembered, Inc., to transfer venue of this action to the U.S. Bankruptcy Court, Southern District of New York, wherein is pending the related case Child World, Inc., case no. 92 B20 887(HS) is GRANTED.

So ordered this 25th day of June, 1993.

/s/
H.F. WHITE
Bankruptcy Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 1993, a copy of the attached Order Granting Motion to Transfer Venue and Denying Motion for Costs and Fees was sent by first class mail to each of the parties listed below.

/s/
Teri Hawkins
Chapter 11
Case Administrator

Patricia L. Taylor/Mark A. Gamin
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Counsel for Child World, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Entered: August 11, 1994

Anthony A. Petrarca	)	CASE NO.
	)	5:93-CV-1582
	)	
Plaintiff/Appellant,	)	
	)	BANKRUPTCY
-vs-	)	CASE NO.
	)	92-5207
Things Remembered, Inc.	)	
	)	
Defendant/Appellee.	)	Judge Sam
	)	H. Bell
	)	

O R D E R

Presently before the court is Plaintiff-Appellant Anthony Petrarca's appeal from the U.S. Bankruptcy Court for the Northern District of Ohio's order granting Defendant/Appellee's motion to transfer venue (docket #9).

STATEMENT OF FACTS

The plaintiff, Anthony Petrarca, initiated this action in the Court of Common Pleas, Summit County, Ohio on March 18, 1992. His four count complaint asserted claims against Child World as lessee and Cole National as guarantor for delinquent rents, future rents (pursuant to an acceleration clause), unpaid common area maintenance costs, taxes, insurance, and late fees from two leases. On April 14, 1992 Things Remembered, Inc. ("TRI") voluntarily entered the case as the successor by merger to Cole National and filed for Leave to Plead.

On May 6, 1992, Child World filed Chapter 11 petitions in the U.S. Bankruptcy Court for the Southern District of New York. Child World filed a suggestion of stay in the Summit

County Common Pleas Court on May 11, 1992, and that court transferred the case (against only Child World) to its inactive docket on May 22. Child World simultaneously rejected the leases.

TRI filed its answer to Petrarca's complaint on May 28, 1992; it filed an amended answer with counterclaim against Petrarca and Colfax Manor Gardens on June 26, claiming that its guarantees were limited and that Petrarca's assignment of the leases to Colfax without Cole National or TRI's consent discharged TRI of its obligations. TRI also claimed in the amended answer that Child World's Chapter 11 bankruptcy filing allowed Child World to reject the leases.

On August 28, 1992, Petrarca filed an amended complaint bringing ten additional claims regarding five other

leases against TRI and Cole National. Recognizing Child World's Chapter 11 status and the Summit County stay, Petrarca did not bring any additional claims against Child World.

On September 25, 1992, TRI filed Notices of Removal in the Summit County court, the U.S. Bankruptcy Court for the Northern District of Ohio, and the United States District Court for the Northern District of Ohio.[1] In support

---

[1]There remains a fair amount of confusion among courts concerning whether notices of removal taken pursuant to 28 U.S.C. §1452 are properly filed with the bankruptcy court instead of the district court. See In re Aztec Industries, Inc., 84 B.R. 464, 468 (Bankr. N.D. Ohio 1987) (holding that petition may be filed directly with the bankruptcy court and citing supporting, as well as contradictory, authority). TRI's decision to file notices with both the district and the bankruptcy court may fairly be seen as an act of caution given the existing uncertainty. The unfortunate consequence of this dual filing was the engendering of separate proceedings involving one and the same action within the single court system.

Although the two matters were ultimately "consolidated" by the district court, a more appropriate course, it seems, would have called for this court to determine whether it or the bankruptcy court property retained jurisdiction

of removal, TRI argued that only the home bankruptcy court in New York could determine the extent of Petrarca's lease rejection damages, if any, after determining Child World's obligations under the leases. This being true, TRI reasoned, TRI's obligations as Child World's guarantor must also be measured by, or with reference to, Child World's obligations as determined under the bankruptcy code. Accordingly, TRI explained, the matter involved in a federal question and was properly removed pursuant to 28 U.S.C. §1441. Relying upon the same assumptions, TRI further reasoned that the case was "related to" Child World's bankruptcy

---

over the matter. While TRI presumably had two adequate, independent bases for removal, it plainly did not have two separately removable actions.

proceeding in New York and was therefore removable under 28 U.S.C. §1452.

Plaintiff filed a motion to remand with the district court on October 23, 1992. Judge Aldrich eventually transferred the district court case to the bankruptcy court for consolidation with the matter pending before Bankruptcy Judge White.

On May 25, 1993, the Ohio bankruptcy court granted a motion by TRI to transfer venue to the United States Bankruptcy Court for the Southern District of Ohio. In so doing, Judge White determined that the notices of removal were timely filed, that TRI had not waived the right to remove the action, and that the court's sole role as a "conduit" bankruptcy court was to transfer the case to the "home" court in New York.

Petrarca now appeals Judge White's May 25, 1993 order.

LAW AND ANALYSIS

Petrarca raises three issues in its appeal. First and foremost, it challenges as erroneous the determination by the bankruptcy court that TRI timely removed the State action. Second, Petrarca claims that the bankruptcy court erred in finding that TRI did not waive its right to remove the action. Third, TRI objects to the bankruptcy court's refusal to abstain from hearing the removed action. Because the objections raised concern conclusions of law reached by the bankruptcy court, this Court reviews the matter de novo. In re Edward M. Johnson, 845 F. 2d 1395, 1398 (6th Cir. 1988).

I. Timeliness of Removal.

As mentioned above, TRI purported to remove this matter from state court pursuant to two independent federal statutes. Petrarca moved the bankruptcy court to remand the action for want of jurisdiction, arguing that TRI had failed to remove the matter within the time period provided by either statute. The bankruptcy court held that TRI failed to remove the matter pursuant to §1452 (bankruptcy removal) of Title 28 in a timely manner. The bankruptcy court further held, however, that TRI's removal was timely under §1441 (federal question removal) of the same title, and, for that reason, the court believed itself to have jurisdiction to consider TRI's motion to transfer.

A. Timeliness of Federal Question Removal

Section 1331 of Title 28 provides the federal district courts original jurisdiction over all civil actions "arising under the Constitution, law, or treaties of the United States." 28 U.S.C. §1331. Section 1441 of the same title allows for the removal to federal district court of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction...." 28 U.S.C. §1441. As discussed above, because TRI believed the application and construction of Title 11 to be determinative of the present dispute, it relied in part upon §1441 in removing the action to the district court.

The chief issue of contention between the parties concerns the

timeliness of TRI's notice of removal. At the core of this dispute is the language of 28 U.S.C. Section 1446(b), which sets forth the appropriate time frame for removing matters deemed removable under §1441. Section 1446(b) provides in relevant part:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed <u>within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may be ascertained that the case is one which is or has become removable</u>, except that a case may not be removed on the basis of

> jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. §1441(b) (emphasis added).

Petrarca's original complaint did not, when filed, implicate the federal bankruptcy code or any other provision of federal law. Therefore, it was not immediately removable, and the thirty day period in which to remove did not begin to run upon service of the summons as provided in the first paragraph of §1446(b). Rather, the filing period commenced "after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it ... [was ascertainable] that the case [was]" removable. The pertinent question for our immediate purpose thus becomes, "What form of notice to the

defendant is required to trigger the clock on the thirty-day filing period provided in the second paragraph of §1446(b)?"

Two competing views have polarized courts faced with the same question. Many courts interpret §1446(b) strictly to require that the defendant receive formal notice from a voluntary act of filing taken by the plaintiff. Apache Nitrogen Products, Inc. v. Harbor Insurance Co., 145 F.R.D. 674 (D. Ariz. 1993); Phillips v. Allstate Insurance Co., 702 F. Supp. 1466 (D. Cal. 1989); Jong v. General Motors Corporation, 359 F. Supp. 223 (N. D. Cal. 1973) Under this view, unless the grounds for removal appear on the face of a pleading or other filing by the plaintiff, the defendant is free to rest upon his right to remove, regardless of

his actual knowledge of grounds upon which to do so. See, e.g., Jong, 359 F. Supp. at 226 ("Therefore, the time period to remove an action cannot depend on defendant's actual knowledge, because the statute expressly allows a defendant to rely on papers presented to it.").

Consistent with this line of authority, TRI argues that the thirty-day period in which it would remove this action began on August 31, 1992 -- the date on which Petrarca served TRI with a paper (its amended complaint) containing specific reference to Child World's bankruptcy.

Judge White accepted as persuasive TRI's arguments and authority, holding "the action became removable to District Court upon the service of the amended complaint on August 31 which indicated Child World had filed a petition in

bankruptcy." Memorandum of Decision filed June 25, 1993, p. 5. Thus, he concluded, TRI's notice of removal filed September 25, 1992 was timely. Id.

Petrarca finds fault with the Bankruptcy Court's narrow reading of §1446(b)'s notice requirement because such a reading ignores TRI's actual knowledge of grounds for removal. Adopting the alternative view, Petrarca insists that the removal period commenced on May 6, 1992 when Child World filed its petition for relief under Chapter 11 and thereby gave TRI actual, if not formal, notice of such grounds.

Petrarca is not alone in arguing the propriety of construing §1446(b)'s notice requirement liberally. See e.g. Mielke v. Allstate Ins. Co., 472 F.Supp. (E.D. Mich. 1979) (no additional time

for removal is allowed if the presence of removal grounds is unambiguous in light of the defendant's knowledge and the claims of the initial complaint); Weaver v. Miller Electric Mfg. Co., Inc., 616 F.Supp. 683 (S.D. Ala. 1985) (the defendant should remove the case if it comes by knowledge, independent of the plaintiff, requiring removal and should not sit upon its rights). In their widely regarded treatise, Wright, Miller and Cooper opine that §1446(b)'s "clear purpose to commence the running of the thirty-day period once the defendant received actual notice that the case has become removable ...." C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters, §3732, p. 520 (1985) (emphasis added).

This Court need not weigh afresh the competing arguments concerning the form of notice necessary to start §1446(b)'s thirty-day clock; the Sixth Circuit Court of Appeals has already considered and answered the question. In Holston v. Carolina Freight Carriers Corp., No. 90-1358, 1991 WL 112809, at **3 (6th Cir. June 26, 1991), the court held:

> 1446(b) starts the thirty day period running from the date that a defendant has solid and unambiguous information that the case is removable, even if that information is solely within its own possession.....Any ambiguity regarding the scope of 1446(b) must be resolved in favor of remand to the state courts.

Believing §1446(b) to be ambiguous on its face, the court construed the statute so as to prevent a defendant from "sit[ting] upon information in its possession until it feels the time is

right to trigger removal ..." after having forced the plaintiff to exhaust his resources in the state court. Id. at **4. In so doing, the court specifically discounted the applicability of the "Voluntary Act" doctrine in matters involving federal question (as opposed to diversity) removal. Id. at **5.

Holden teaches that §1446(b)'s thirty-day filing period commences once the defendant gains "solid and unambiguous information that the case is removable," regardless of the source of that information. Id. at **3. Petrarca contends that TRI received actual notice that the case was removable on May 6, 1992 when Child World filed chapter 11 petitions. TRI claims that it did not have notice until August 31, 1992 when it was served with Petrarca's amended

complaint bringing new claims for other leases which involved the application of bankruptcy law.

The facts and pleadings placed before this Court demonstrate that the Petrarca's amended complaint was merely the procedural tool with which TRI procured removal as opposed to the actual source from which TRI discovered the basis for that removal. The amended complaint does not allege facts concerning Child World's bankruptcy petition which were unknown to TRI. Given the corporate relationship between the two defendants, it is nearly impossible to imagine that TRI was unaware on May 6, 1992 that Child World was filing a bankruptcy petition. Assuming arguendo it was unaware on May 6, it plainly had knowledge of the bankruptcy proceedings on June 26, 1992,

the date on which it filed its amended answer. In that answer, TRI pointed to Child World's petition as justification for Child World's rejection of its leases. Thus, TRI plainly had solid, unambiguous information from which it had received actual notice of the bankruptcy by June 26, 1992. This being true, the September 25, 1992 notice of removal was plainly without the thirty-day period for removal provided by §1446(b).

B. Timeliness of the bankruptcy court removal

Having determined that TRI did not timely remove this matter pursuant to 28 U.S.C. §§1441 and 1446, the Court considers whether TRI nonetheless properly removed it under 28 U.S.C. §1452. Section 1452 provides specifically for the removal of claims

related to bankruptcy cases. It states in part:

> (a) A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334[2] of this title.

28 U.S.C. §1452.

Bankruptcy Rule 9027 (titled "Notice of Removal") places temporal limitations upon the removal of claims or causes under §1452. In re Aztec Industries, Inc., 84 B.R. 464, 469 (Bankr. N. D. Ohio 1987). Rule 9027(a) provides in part:

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[2] Section 1334 provides the district courts with original jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §1334.

> (2) If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay if the claim or cause of action in a civil action has been stayed under Section 362 of the Code, or (C) 30 days after a trustee qualifies in a Chapter 11 reorganization case but not later than 180 days after the order for relief.
>
> (3) If a case under the Code is pending when a claim or cause of action is asserted in another court, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

Bankruptcy Rule 9027(a)(2) & (3).

Petrarca initiated the state action on March 18, 1992. The "related" case under the bankruptcy code commenced on May 6 of the same year when Child World filed its Chapter 11 petitions in New York. Since the Ohio state action preceded the related bankruptcy action, the bankruptcy court for this district applied the ninety-day limit provided in sub-section (a)(2) of Rule 9027 to determine the timeliness of TRI's removal under 1452. The ninety-day period ended on August 5, 1992; accordingly, the bankruptcy court concluded that TRI's September 25 removal was not timely under §1452.[3]

Contesting this conclusion, TRI distinguishes claim removal from removal

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[3]Because it believed TRI's removal to be timely pursuant to 28 U.S.C. §§1331 & 1346, however, the bankruptcy court declined to remand the action.

of an entire cause of action, noting that §1452 allows a party to remove the entire lawsuit. Because ten of the removed claims (those added by Petrarca in its August 28, 1992 amended complaint) had not yet been filed when the ninety-day period provided by Rule 9027(a)(2) expired, TRI reasons, it was impossible for TRI to remove those claims within the ninety-day window. Rather, TRI implies, it had -- consistent with Rule 9027(a)(3) -- an additional thirty-days from receipt of the amended complaint in which to remove the new claims set forth therein.

The Bankruptcy Court for the Northern District of Texas, when considering whether an amendment to the plaintiff's pleadings operates to extend the removal period provided by

Rule 9027, turned to 28 U.S.C. §1446 for guidance, observing:

> Bankruptcy Rule 9027 substantially conforms to the language and procedure of 28 U.S.C. §1446. There is no case law to guide this Court on the effect of amended pleadings on the removal of cases under 28 U.S.C. §1478 [since repealed and replaced by 28 U.S.C. §1452] and Bankruptcy Rule 9027. This Court must rely on decisions concerning the removal of state court actions to United States district [sic] 28 U.S.C. §1446 for guidance since federal law controls.

In Re Shaffer, 42 B.R. 522, 525 (Bankr. N.D. Tex. 1994). Having conducted an extensive search, this court has found no authority offering a mere [sic] persuasive method of analysis than that employed in Shaffer. That court's

reliance on §1446 seems prudent and leads to a logical resolution of the problem before us.

As discussed previously, 28 U.S.C. §1446 allows for removal from state to district court: (1) within thirty days after service of the initial pleading setting forth the removable claim; or (2) "if the case stated by the initial pleading is not removable," within thirty days of receipt by defendant of information demonstrating that the matter has become removable. Thus, "[u]nless the amendment gives rise to another removable basis, a party will not acquire an additional thirty days in which he or she can remove his or her case." Shaffer, 42 B.R. at 525 (emphasis added).

Were it's true that Petrarca's amended complaint presented for the

first time removable claims, this Court might be persuaded that TRI had thirty more days in which to remove those claims. Under the circumstances presented, however, this court feels the bankruptcy court properly held that TRI failed to remove its case pursuant to §1452 in a timely fashion.

As previously observed, the ten claims added by Petrarca's amended complaint were predicted upon grounds identical to those underlying the two claims comprising the initial complaint. Accordingly, if -- as TRI alleges -- the added claims were removable because they were related to Child World's bankruptcy, so too were the original claims. Thus, the original cause of action was pending and removable within the purview of Rule 9027(a) when Child World filed for Chapter 11 protection on

May 6, 1992. TRI's opportunity to remove that cause (or any single claim therein) pursuant to §1452 and Rule 9027 arose on May 6 and expired ninety days thereafter. The "new" claims asserted in the amended complaint did not enable TRI to revive its lost removal option since they neither added nor substantially altered the basis for removal.

II. Remaining Issues on Appeal

Having determined that the notices of removal were filed untimely, and thus that the bankruptcy court lacked jurisdiction over this matter, this Court need not address the issues of abstention and waiver raised on appeal.

CONCLUSION

For the foregoing reasons, the Bankruptcy Court's order denying Plaintiff's motion to remand and granting Defendant's motion to transfer venue is reversed. The case is remanded to the Bankruptcy Court for further proceedings consistent with this order.

IT IS SO ORDERED.

/s/
SAM H. BELL
United States District Judge

APPENDIX D

No. 94-3980
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY A. PETRARCA, Plaintiff-Appellee,	)	
v.	)	ORDER
THINGS REMEMBERED, INC., Defendant-Appellant.	)	

Defendant filed a notice of appeal of the order of the district court remanding this action to the bankruptcy court for the purposes of remanding it to the state court from which it had been removed. The district court concluded that defendant's notices of removal pursuant to both 28 U.S.C. § 1441 and 28 U.S.C. § 1452 were untimely.

Consequently, the bankruptcy court lacked jurisdiction.

As a general rule, an order remanding an action to a state court from which it was removed is not reviewable on appeal or otherwise. 28 U.S.C. § § 1447(d) and 1452(b); *see State of Ohio v. Wright*, 992 F.2d 616 (6th. Cir. 1993) (en banc); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341 (6th Cir. 1993); *Boone Coal and Timber Co. v. Polan*, 787 F.2d 1056, 1061 (6th Cir. 1986). It does not appear, therefore, that the order of the district court is an appealable order.

Defendant is hereby direct [sic] to show cause, within twenty-one days of the entry of this order, why this appeal should not be dismissed for lack of jurisdiction.

ENTERED PURSUANT TO RULE 8(b)
SIXTH CIRCUIT RULES

Leonard Green, Clerk

/s/_____

CERTIFICATE OF SERVICE

A true copy of the foregoing Petition for Certiorari was sent by regular U.S. Mail, postage prepaid on this 10th day of March, 1995 to:

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One of the Attorneys for
Appellant Things Remembered,
Inc.

In compliance with Rule 29.5. all parties required to be served have been served.

Supreme Court, U.S.
FILED
APR 6 1995
CLERK

No. 94-1530

In The

Supreme Court of the United States

October Term, 1994

THINGS REMEMBERED, INC.,

Petitioner

v.

ANTHONY A. PETRARCA,

Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an order of a District Court remanding on jurisdictional grounds a case which had been removed under 28 U.S.C. § 1446 is reviewable by the Court of Appeals.[1]

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[1]Plaintiff-Respondent Petrarca has restated the Question Presented for Review based upon Petrarca's position, as set forth in greater detail infra, that by not appealing from Bankruptcy Judge Harold White's holding that the "bankruptcy removal" was not timely, Petitioner has waived its right to seek further review of that issue even if the District Court remand Order is appealable. Further, it is Petrarca's position that given the statutory language of §§ 1447 and 1452, this case was clearly remanded on jurisdictional grounds under § 1447 and not under § 1452 as Petitioner contends.

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STATUTES INVOLVED IN THE CASE

Respondent, Anthony A. Petrarca, recites here only 28 U.S.C. § 1446, not included by Petitioner in this section of the Petition for Writ of Certiorari, although Petitioner did recite in their entirety the other Statutes involved in the case 28 U.S.C. §§ 1447 and 1452.

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal persecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be

filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A notice of removal of a criminal prosection shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that

a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants

shall give written notice thereof, to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such

cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

STATEMENT OF THE CASE

Plaintiff-Respondent Anthony A. Petrarca (hereinafter "Petrarca") commenced this action by filing his Complaint in the Summit County, Ohio Court of Common Pleas on March 18, 1992. Petrarca's Complaint named Child World, Inc. (hereinafter "Child World") and Cole National Corporation (hereinafter "Cole") as Defendants. Petrarca's Complaint sets forth four counts. The first count is a claim against Child World as lessee and Cole as guarantor for delinquent rents, unpaid common area maintenance costs, taxes, insurance, and late fees relative to a lease between Petrarca and Child World, for a Child World Store in Denver, Colorado. The second count is a claim against Child World as lessee, and Cole as guarantor for future rents pursuant to that Denver lease which had accelerated as a result of the default. The third and fourth counts assert claims against Child World only and are not involved in this appeal.

On April 14, 1992, Things Remembered, Inc. (hereinafter "TRI"), a non-party to the action, in contravention of the Ohio Rules of Civil Procedure, purported to enter into the case "as a successor by merger to Defendant Cole National Corporation" and took an automatic Leave to Plead for twenty-one (21) days up through and including May 11, 1992, purportedly pursuant to Summit County Local Rules of Court.

On May 6, 1992, Child World filed petitions pursuant to Chapter 11 of Title 11, United States Code, in the United States Bankruptcy Court for the Southern District of New York, the same being Case No. 92B20887.

On May 11, 1992, Child World filed with the Summit County Court of Common Pleas a suggestion of stay in this action, and on May 22, 1992, the Honorable Ted Schneiderman entered an Order ordering that the case be transferred to the inactive docket as to Child World only subject to reinstatement at such time as the court has been notified that the bankruptcy stay Order has been removed.

The case proceeded against Cole and against TRI. TRI filed an Answer on May 28, 1992. In its Answer TRI did not assert as an affirmative Defense or otherwise that this case should properly be in Federal Court. Next, TRI noticed and took two depositions, one of a non-party witness to this action and one of Plaintiff Petrarca.

On June 26, 1992, TRI filed its Amended Answer and Counterclaims in the Court of Common Pleas, Summit County, Ohio. TRI asserted not only Counterclaims against Plaintiff Petrarca but also joined an additional Counterclaim Defendant Colfax Manor Gardens, previously not a party to the action, and asserted purely permissive Counterclaims against Colfax Manor Gardens. TRI asserted in its Counterclaim four (4) counts for declaratory judgment raising issues which were virtually identical to those raised by Petrarca's original Complaint but relating to four (4) additional Child World stores and leases between Petrarca and Child World and Cole guaranties of those leases. Obviously, TRI made no

reference in its Amended Answer and Counterclaims to the fact that it believed this action should properly be in Federal Court.

The parties proceeded with discovery until on August 28, 1992, Petrarca filed his First Amended Complaint bringing five (5) additional guaranty claims against TRI and Cole again raising the identical issues previously raised by Petrarca's original Complaint and also subsequently raised by TRI's Counterclaim. Two (2) of the properties which are the subject of Petrarca's First Amended Complaint had previously been placed in issue by TRI's Counterclaim. These are the Manheim, Pennsylvania property and the Westland, Michigan property.

On or about September 15, 1992, TRI filed in the Court of Common Pleas, Cuyahoga County, Ohio a separate Complaint for declaratory relief against Anthony A. Petrarca and other Defendants seeking declaratory judgment upon two (2) additional Cole guaranties of Child World leases raising issues similar to, although not identical to, the issues raised in this litigation but as to still

two (2) additional properties (hereinafter "TRI vs. BGTV"). Again, obviously, TRI did not assert in its Complaint in TRI vs. BGTV filed in Cuyahoga County Common Pleas Court that those claims are properly raised and litigated only in Federal Court.

On or about September 25, 1992, TRI improperly filed its Notice of Removed Action in the Court of Common Pleas, Summit County, Ohio, indicating that the case had been removed to the United States District Court, Northern District of Ohio and indicating further that the case had been removed **only pursuant to 28 U.S.C. § 1446(d).** On or about the same day, TRI filed in the United States District Court for the Northern District of Ohio and in the United States Bankruptcy Court for the Northern District of Ohio two (2) separate Notices of Removal indicating that the case had been removed pursuant to 28 U.S.C. §§ 1331, 1334(b), 1441, 1446, 1452 and Bankruptcy Rule 9027.

On or about October 5, 1992, before the two (2) removals were consolidated, TRI filed only in the District Court a

Motion to Dismiss Petrarca's First Amended Complaint.

On October 23, 1992, Petrarca filed in District Court a Motion to Remand and Motion for Costs. Petrarca subsequently filed a virtually identical Motion in the Bankruptcy Court.

On October 29, 1992, Petrarca filed only in District Court a Motion to Stay Proceedings on the Motion to Dismiss asking Judge Ann Aldrich to rule first on Petrarca's Motion to Remand. Petrarca also filed a Brief in Opposition to TRI's Motion to Dismiss.

TRI filed both in the District Court and in the Bankruptcy Court Memoranda in Opposition to Petrarca's Motions to Remand, and then on December 17, 1992, TRI filed only in the Bankruptcy Court a Motion to Transfer Venue and a Memorandum in Support requesting the Bankruptcy Court to transfer venue of this case to the United States Bankruptcy Court for the Southern District of New York. Petrarca filed a Brief in Opposition and TRI filed a Reply Memorandum.

On June 25, 1993, Judge Harold F. White of the United States Bankruptcy

Court for the Northern District of Ohio entered his Memorandum of Decision on Motion to Remand and Motion to Transfer Venue. Judge White found and held that TRI's removal to the District Court under the general removal statute, 28 U.S.C. § 1446, was proper. However, Judge White also found and held "that the removal to [the bankruptcy] court was untimely." Memorandum of Decision on Motion to Remand and Motion to Transfer Venue, June 25, 1993, at 6, See Appendix C at p. 20a.

Petrarca timely appealed to the United States District Court. **TRI did not appeal from any aspect of Judge White's decision.** Upon consideration of Petrarca's appeal, the District Court, Judge Sam Bell, reversed. Relative to the federal question removal, Judge Bell held that the September 25, 1992, Notice of Removal "was plainly [outside of] the thirty day period for removal provided by § 1446(b)." Order of August 11, 1994, See Appendix C at p. 50a[2]. Judge Bell

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[2]Citations to Appendices are citations to the Appendices contained in the 6 1/8 x 9 1/4 inch version of Petitioner's Petition for Writ of Certiorari.

then went on to affirm the Bankruptcy Court's holding that TRI had failed to timely remove the case under the bankruptcy removal provisions of 28 U.S.C. § 1452 and Bankruptcy Rule 9027.

The District Court reversed the Order of the Bankruptcy Court only insofar as the Bankruptcy Court had held that TRI's removal under the general removal statute was proper. The District Court remanded the case to the Bankruptcy Court for further proceedings consistent with the District Court Order.

TRI appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit ordered TRI to show cause why the appeal should not be dismissed since, "[a]s a general rule, an order remanding an action to a state court from which is (sic) was removed is not reviewable on appeal or otherwise. 28 U.S.C. §§ 1447(d) and 1452(b); * * * [Citations omitted.] * * * It does not appear, therefore, that the order of the district court is an appealable order." Order, September 29, 1994, at 1, See Appendix D at p. 61a. The parties briefed the show cause Order, and the

Sixth Circuit then dismissed the appeal. The Sixth Circuit held: "The record clearly demonstrates that defendant sought removal pursuant to the general removal statute and that the district court held that the notice of removal was not filed within the time required by 28 U.S.C. § 1446(b). Thus, Section 1447(d) prohibits review of that ruling. [Citations omitted.]" Order, November 15, 1994, at 2, See Appendix A at pp. 2a - 3a. Relative to the bankruptcy removal, the Sixth Circuit held: "In addition, the district court held that the notice of removal pursuant to section 1452 was not timely filed. Appellate review of that ruling is likewise barred. [Citations omitted.]" Order, November 15, 1994, at 2, See Appendix A, at p. 3a.

TRI then petitioned the Sixth Circuit for rehearing and rehearing en banc. In response, the Sixth Circuit entered an Order concluding "that the issues raised in the petition were fully considered upon the original submission and decision of the case." Order, January 12, 1995, at 1, See Appendix B, p. 7a.

On January 20, 1995, TRI filed as Plaintiff in state court in Denver, Colorado, a declaratory judgment action seeking a declaration by the Colorado state court of the rights and liabilities of TRI, Petrarca, and three other party defendants relative to the very same Denver Child World guaranty which was the subject of Petrarca's original Complaint but which TRI disingenuously argues here must be litigated in the federal court system.

On March 10, 1995, TRI filed its Petition for a Writ of Certiorari in this Court.

On March 15, 1995, TRI filed as Plaintiff in state court in Lancaster, Pennsylvania, an Action for Declaratory Judgment seeking a declaration by the Pennsylvania state court of the rights and liabilities of TRI, Petrarca, and three (3) other party defendants relative to a guaranty of the tenant's obligations under a lease of a Child World store in Manheim Township, Pennsylvania. That Manheim Child World guaranty had been originally placed in issue **in the Summit County, Ohio litigation by TRI** in the

Second Claim of its Counterclaim filed June 26, 1992. Petrarca also placed the Manheim Child World guaranty in issue in Counts Seven and Eight of his First Amended Complaint filed August 28, 1992. These two counts were improperly included in TRI's removals. As with the Denver guaranty, TRI disingenuously argues to this Court that the Manheim guaranty must be litigated in Federal Court, while at the same time TRI is commencing and pursuing a declaratory judgment action on that guaranty in state court in Pennsylvania.

SUMMARY OF THE ARGUMENT

This Court should deny TRI's Petition for the following five reasons.

First of all, TRI waived the right to assert the argument it intends to assert if this Court grants the Petition when TRI failed to appeal the Bankruptcy Court Order which held, in part, that TRI had failed to timely remove this case under the bankruptcy removal statute. Additionally, TRI has waived its right to argue that the issues to be litigated between Petrarca and TRI ought to be litigated in Bankruptcy Court as a result of TRI's commencement of two separate state court actions wherein TRI seeks declaratory judgments on the very same issues which it contends must be litigated in Federal Bankruptcy Court.

Secondly, since a remand under the bankruptcy statute may only be on equitable grounds, and since this remand was on jurisdictional grounds, this remand which TRI contests was clearly not under the bankruptcy statute but, rather, was under the general removal and remand provision.

Third, in Daleske v. Fairfield Communities, Inc., ___ U.S. ___, 128 L.Ed. 2d 461, 114 S.Ct. 1832 (1994), this Court recently denied a Petition for Writ of Certiorari in a case seeking a review of issues which are similar to, if not identical to, those issues presented by Petitioner TRI in this case.

The cases which TRI contends support its interpretation of 28 U.S.C. § 1452(b) are sufficiently distinguishable from the instant case or simply do not support Petitioner's position. Therefore, the conflict between the Circuits which TRI perceives does not in fact exist and is not a basis for this Court to grant Certiorari.

Finally, this Court should deny the Petition for the reason that there is already existing authority from this Court deciding the issue framed by Petitioner. United States v. Rice, 327 U.S. 742 (1946), Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976), Gravitt v. Southwestern Bell Telephone Co., 430 U.S. 723 (1977), and Volvo of America Corp. v. Schwarzer, 429 U.S. 1331 (1976), all hold that cases remanded on

grounds permitted within 28 U.S.C. § 1447 are not reviewable on appeal or otherwise.

ARGUMENT

REASONS FOR DENYING THE PETITION

I. THIS COURT SHOULD DENY TRI'S PETITION BECAUSE WHEN TRI FAILED TO APPEAL THE BANKRUPTCY COURT ORDER, TRI WAIVED THE ARGUMENT IT INTENDS TO ASSERT IF THIS COURT GRANTS THE PETITION.

This Court and other federal appellate courts have long recognized the proposition that this Court is without jurisdiction to consider an argument not raised in the court below. Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447 (1936); United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940); and Michel v. Louisiana, 350 U.S. 91 (1955).

In this case, it is clear from the record of each court in which this case has proceeded that TRI attempted to remove this action both under the general removal statute, 28 U.S.C. § 1446, and under the bankruptcy removal statute, 28 U.S.C. § 1452. In fact, the Notice of

Removed Action filed in the Summit County Court of Common Pleas indicated that the case had been removed **only pursuant to 28 U.S.C. § 1446(d).** The Bankruptcy Court held that TRI had failed to timely remove this case under the bankruptcy removal statute but that TRI had timely removed the case under the general removal statute. **TRI did not appeal any aspect of that ruling of the Bankruptcy Court.** Because the bankruptcy judge ordered the case transferred to the United States Bankruptcy Court for the Southern District of New York, Petrarca did appeal the Bankruptcy Court's holding that the case was properly removed under the general removal statute. Now, despite TRI's reliance upon the Bankruptcy Court's holding that it had properly removed the case under the general removal statute, and despite TRI's failure to appeal Judge White's holding that TRI had failed to properly remove the case under the bankruptcy removal statute, TRI desires to have this Court accept jurisdiction over the question of whether or not an appeal of an Order remanding a case removed under the 28

U.S.C. § 1452 is barred where the remand order is based on jurisdictional grounds. Since Petrarca appealed the Bankruptcy Court's holding that the case had been properly removed under the general removal provisions, the District Court's Order, in effect, only reversed that portion of the Bankruptcy Court Order and remanded the case under the provisions of 28 U.S.C. § 1447(d) which reads:

> An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to Section 1443 of this title shall be reviewable by appeal or otherwise.

Section 1447(d) does not include the language which TRI asks this Court to examine and which is contained in 28 U.S.C. § 1452. TRI's argument is misdirected since this case was not remanded under § 1452. TRI failed to appeal the Bankruptcy Court's earlier holding that the bankruptcy removal was not timely. Therefore, TRI waived its right to appeal that question here.

TRI has also waived its right to argue that these issues as between Petrarca and TRI ought to, and can only, be litigated in Bankruptcy Court as a result of TRI's most recent conduct in commencing two (2) separate state court actions as plaintiff seeking to litigate in state court the very same issues which are the subject of TRI's appeal to the Sixth Circuit and of this Petition.

In this regard, not only has TRI waived its right to assert that these issues ought to, and can only, be litigated in Bankruptcy Court. The question which TRI asks this Court to decide is now moot as a result of TRI's conduct in commencing state court actions in Colorado and in Pennsylvania on these very same issues.

Federal Courts are prohibited from deciding moot questions. There must be an actual case or controversy between the parties at the time the issue is reviewed. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937), reh. den. 300 U.S. 687 (1937); North Carolina v. Rice, 404 U.S. 244 (1971). "[M]oot questions require no answer." Missouri,

Kansas & Texas R. Co. v. Ferris, 179 U.S. 602, 606 (1900). Further, this Court may refuse to consider unnecessary questions. Mercer v. Theriot, 377 U.S. 152 (1964), reh. den. 377 U.S. 973 (1964).

In this case, as a result of TRI's voluntary choice to pursue state court remedies on those issues it had previously argued must be litigated in Bankruptcy Court, the issues are moot and it is unnecessary for this Court to decide the issue presented by Petitioner TRI.

II. THIS COURT SHOULD DENY TRI'S PETITION SINCE THE REMAND CLEARLY WAS NOT "ON EQUITABLE GROUNDS" AND IS THEREFORE CLEARLY NOT "AN ORDER ENTERED UNDER 28 U.S.C. § 1452(b)."

The remand provision in § 1452(b) is limited to discretionary remands based upon equitable grounds. The statute reads: "The Court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground." (Emphasis added.) If

§ 1452(b) were the only statute to apply under circumstances such as those presented by this case, there would be no requirement that cases removed under § 1452(a) be remanded on the purely legal ground that the District Court lacks subject matter jurisdiction over the case. Since § 1447(c) requires remand in cases where the District Court lacks subject matter jurisdiction, § 1447 and § 1452 cover different situations and must both be given effect. For this reason as well, it is clear that the District Court remanded this case under the provisions of § 1447 and not under the provisions of § 1452. Therefore, Sub-Section 1447(d) governs this remand Order, and the Order is not reviewable on appeal or otherwise under any circumstances. Therefore, this Honorable Court should deny the Petition.

III. THIS COURT SHOULD DENY TRI'S PETITION SINCE IT HAS RECENTLY REFUSED TO GRANT A PETITION FOR WRIT OF CERTIORARI SEEKING REVIEW OF ISSUES SIMILAR TO, IF NOT IDENTICAL TO, THOSE ISSUES PRESENTED IN THIS CASE.

This Court recently rejected a Petition for Writ of Certiorari in another case which sought review of issues similar to, if not identical to, those presented by Petitioner in this case.

In Daleske v. Fairfield Communities, Inc., 17 F.3d 321 (10th Cir. 1994), the United States Court of Appeals for the Tenth Circuit held, as argued by this respondent above, as follows:

> Moreover, the remand provision in section 1452(b) is limited to discretionary remands based on equitable grounds. If this were the only statute to apply, there would be no requirement that cases removed under § 1452(a) be remanded on the purely legal ground that the district court lacks subject matter jurisdiction. Because § 1447(c) requires such a remand, the statutes cover different contingencies, and should both be given effect. For these reasons, the provisions of 28 U.S.C. § 1447(c) apply to cases removed under § 1452(a) as well.

Id., at 324.

After the Tenth Circuit affirmed the Colorado District Court holding, appellants filed a Petition for Writ of Certiorari which this Court denied. Daleske v. Fairfield Communities, Inc.,

___ U.S. ___, 128 L.Ed. 2d 461, 114 S.Ct. 1832 (1994).

This Court has recently decided that the issue presented by Petitioner is not so significant as to require grant of a Petition for Writ of Certiorari.

IV. THIS COURT SHOULD DENY THE PETITION BECAUSE THE CONFLICT IN THE CIRCUITS WHICH TRI PERCEIVES DOES NOT IN FACT EXIST.

TRI cites this Court to four cases which it argues support its position that remands under § 1452(b) on grounds other than equitable grounds are in fact reviewable. Those cases are Pacor, Inc. v. Higgins, 743 F.2d 984 (3rd Cir. 1984); In re: National Developers, Inc. 803 F.2d 616 (11th Cir. 1986); Browning v. Navarro, 743 F.2d 1069 (5th Cir. 1984); and National City Bank v. Coopers and Lybrand, 802 F.2d 990 (8th Cir. 1986). For the reasons described below, each of these cases is sufficiently distinguishable from the instant case and the cases presented by TRI as on the other side of the "conflict" such that

there is in fact no conflict among the Circuits as argued by TRI.

Pacor, supra, was removed and ordered remanded under the bankruptcy removal statute only, 28 U.S.C. § 1478 which became 28 U.S.C. § 1452 under the Bankruptcy Amendments and Federal Judgeship Act of 1984. Pacor was not removed or remanded under the general removal statute.

In re: National Developers, Inc., supra, similarly was removed only under the bankruptcy removal statute and not under the general removal statute. The Eleventh Circuit also found it significant that the case had been removed from a state court in the territory covered by the Southern District of New York to the Bankruptcy Court for the Middle District of Alabama. The Court of Appeals therefore found that it was not a properly removed action and therefore non-reviewability did not apply. The Court cited Browning v. Navarro, supra, and Pacor, Inc. v. Higgins, supra, for this proposition.

TRI cites National City Bank v. Coopers and Lybrand, for the proposition

that the Eighth Circuit accepted appellate jurisdiction over the remand of a bankruptcy removal even though the Court had declined to hear the appeal of a remand Order based on lack of federal question jurisdiction under § 1331. Since the Eighth Circuit found that the remand Order was not reviewable to the extent that it was based on a lack of federal question jurisdiction, the opinion in National City Bank v. Coopers and Lybrand is supportive of Petrarca's position. In this case, the District Court found that both the general removal and the bankruptcy removal were not timely. Therefore, under neither method of removal did the Federal Court have jurisdiction over this action.

Finally, Browning v. Navarro, supra, also does not support Petitioner's position. While Browning does contain a long footnote containing a thorough discussion of reviewability of remand Orders, that footnote is merely dicta since the issue before the appellate court in Browning was whether or not the parties had complied with an earlier Bankruptcy Court remand Order.

Again, for all of the foregoing reasons, the conflict between the Circuits which Petitioner perceives does not in fact exist. The cases presented by Petitioner in support of its position relative to interpretation of 28 U.S.C. § 1452(b) are either distinguishable or simply do not in fact support TRI's interpretation of § 1452.

V. THIS COURT SHOULD DENY THE PETITION FOR THE REASON THAT THERE IS ALREADY EXISTING UNITED STATES SUPREME COURT CASE LAW DECIDING THE ISSUE FRAMED BY PETITIONER.

There are numerous decisions of this Court which confirm the rule that cases remanded when the District Court determines that the case was removed improvidently or that the District Court is without jurisdiction over the case are not reviewable by the Court of Appeals. This line of cases starts at least with United States v. Rice, 327 U.S. 742 (1946). More recently, this Court has decided Thermtron Products, Inc. v.

Hermansdorfer, 423 U.S. 336 (1976), Gravitt v. Southwestern Bell Telephone Co., 430 U.S. 723 (1977), and Volvo of America Corp. v. Schwarzer, 429 U.S. 1331 (1976).

In Thermtron, this Court held that § 1447(d) does not bar appellate review by mandamus of a remand Order which is made on grounds which are not specified in § 1447(c), but in doing so also re-emphasized the rule that cases remanded on grounds permitted within the statute are not reviewable.

Gravitt reversed a Court of Appeals Order which, by mandamus, had ordered a District Court to vacate its remand Order because the District Court had employed erroneous principles in concluding that it was without jurisdiction. This Court again confirmed the rule that the remand Order was not reviewable, holding:

> The District Court's remand order was plainly within the bounds of § 1447(c) and hence was unreviewable by the Court of Appeals, by mandamus or otherwise. Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, is not to the contrary, for there the District Court remanded 'on grounds wholly different from those upon which § 1447(c) permits

> remand.' Id., at 344. Thermtron did not question but re-emphasized the rule that § 1447(c) remands are not reviewable.

430 U.S. 723, at 723-724.

Finally, in Volvo, upon an application for a stay of a District Court Order pursuant to 28 U.S.C. § 1447(c) remanding an alleged diversity class action to state court on the ground that the District Court had no jurisdiction of the action, Justice Rehnquist denied the application for stay holding that appellate review of a remand Order based on § 1447(c), whether erroneous or not, is barred by § 1447(d).

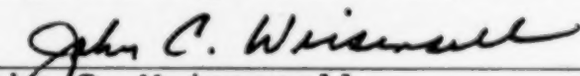
Again, since in this case Petitioner removed this action **both** under the general removal provisions **and** under the bankruptcy removal provisions, this case must be governed by not only the bankruptcy removal provisions but also the general removal provisions, including § 1447(d) and this Court's existing case law interpreting that section. Therefore, there is existing case law from this Court which is dispositive of the question presented by Petitioner, and

on that basis, this Court should deny this Petition.

CONCLUSION

For all of the reasons set forth above, this Court should deny Petitioner, Things Remembered, Inc.'s Petition for Writ of Certiorari and refuse to review the Sixth Circuit Court of Appeals' Order which, in turn, refused to review the District Court's Order remanding this case to the Bankruptcy Court with instructions to remand this case to state court consistent with the District Court Opinion.

Respectfully submitted,



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In compliance with Rule 29.5, all parties required to be served have been served.

(3)

No. 94-1530

Supreme Court, U.S.
FILED
JUN 15 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

THINGS REMEMBERED, INC.,

Petitioner,

v.

ANTHONY A. PETRARCA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 10, 1995
CERTIORARI GRANTED MAY 1, 1995

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES IN ALL THE COURTS BELOW

- From Petrarca v. Child World, Inc. et al., Case No. CV-1992-03-1069 (Summit County, Ohio, Court of Common Pleas):

DATE	*DESCRIPTION*
March 18, 1992	Summons and Complaint
April 20, 1992	First Leave to Plead (Things Remembered, Inc., successor by merger to Cole National Corporation)
May 11, 1992	Second Leave to Plead (Stipulated)
May 22, 1992	Order (transferring case to inactive docket as to Child World, Inc. only)
May 29, 1992	Answer
June 26, 1992	Amended Answer and Counterclaims
Aug. 28, 1992	First Amended Complaint
Sept. 25, 1992	Notice of Removed Action (to District Court)
Sept. 28, 1992	Notice of Removed Action (to Bankruptcy Court)

- from Petrarca v. Child World, Inc., Case No. 1:92 CV 1996 (N.D. Ohio (Aldrich, J.)):

Sept. 25, 1992	Notice of Removal
Oct. 23, 1992	Petrarca's Motion to Remand to State Court and Motion for Costs and Expenses
Nov. 6, 1992	Things Remembered's Motion to Transfer Case to United States Bankruptcy Court With Directions to Consolidate and Transfer Venue with Memorandum in Support
Nov. 17, 1992	Petrarca's Memorandum in Opposition to Defendant's Motion to Transfer Case to United States Bankruptcy Court With Directions to Consolidate and Transfer Venue with Memorandum in Support
Nov. 19, 1992	Things Remembered's Memorandum in Opposition to Plaintiff's Motion to Remand to State Court and Motion for Costs and Expenses
Nov. 30, 1992	Things Remembered's Reply Brief in Support of Motion to Transfer Case to United States Bankruptcy Court With Directions to Consolidate and Transfer Venue

March 25, 1993	Order (transferring Case No. 1:92 CV 1996 to United States Bankruptcy Court and ordering consolidation with Case No. 92-5207)

- from Petrarca v. Child World, Inc., Case No. 92-5207 (Bankr., N.D. Ohio (White,.J.)):

Sept. 25, 1992	Notice of Removal
Nov. 25, 1992	Petrarca's Motion to Remand to State Court and Motion for Costs and Expenses
Dec. 14, 1992	Things Remembered's Memorandum in Opposition to Motion to Remand and Motion for Costs (specifically, Exhibit A thereto: "Order Pursuant to Bankruptcy Code Section 365(a) Authorizing Rejection of Certain Unexpired Leases," entered May 6, 1992 in In re Child World, Inc., Chapter 11 Case No. 92 B 20887 (HS) (Bankr., S.D.N.Y.))
Dec. 17, 1992	Things Remembered's Motion to Transfer Venue with Memorandum in Support
Dec. 28, 1992	Plaintiff's Brief in Opposition to Motion to Transfer Venue

Jan. 26, 1993	Things Remembered's Reply Memorandum in Further Support of Motion to Transfer Venue
March 29, 1993	Petrarca's Supplemental Authority in Support of Plaintiff's Motion to Remand
June 25, 1993	Memorandum of Decision on Motion to Remand and Motion to Transfer Venue, with Order Granting Motion to Transfer Venue and Denying Motion for Costs and Fees

- from Petrarca v. Things Remembered, Inc., Case No. 5:93-CV-1582 (N.D. Ohio (Bell, J.)):

Aug. 13, 1993	Brief for Appellant Petrarca
Aug. 31, 1993	Brief for Appellee Things Remembered, Inc. (specifically, Exhibit B thereto: "Order Approving Settlement Agreement Among Child World, Inc. and Cole National Corporation, CW Holding Corporation and Things Remembered, Inc.," entered May 4, 1993 in In re Child World, Inc., Chapter 11 Case No. 92 B 20887 (HS), Child World, Inc. v. Cole National Corporation, et al., Adv. Proc. Proc. No. 93-5025A (Bankr., S.D.N.Y.))

Sept. 27, 1993	Plaintiff-Appellant Petrarca's Reply Brief
Aug. 11, 1994	Order (reversing the Bankruptcy Court's Order of June 25, 1993 and remanding the case to the Bankruptcy Court)

- from Petrarca v. Things Remembered, Inc., Case No. 94-3980 (6th Cir.):

Sept. 29, 1994	Order (to show cause why appeal should not be dismissed for lack of jurisdiction)
Nov. 15, 1994	Order (dismissing case *sua sponte* for lack of jurisdiction)
Jan. 12, 1995	Order (denying petition for rehearing en banc)

APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	)	ADVERSARY
	)	PROCEEDING 92-5207
ANTHONY PETRARCA	)	
	)	
	)	RELATED CASE
Plaintiff	)	CHILD WORLD, INC.
	)	CHAPTER 11 PENDING
vs.	)	IN THE BANKRUPTCY
	)	COURT FOR THE
CHILD WORLD, INC.,	)	SOUTHERN DISTRICT
et al.	)	OF NEW YORK CASE
	)	NO. 92 B20 887 (HS)
Defendant	)	

MEMORANDUM OF DECISION ON MOTION TO REMAND AND MOTION TO TRANSFER VENUE

Before this court is a motion filed by plaintiff Anthony A. Petrarca ("Petrarca") to remand this action to state court. Also before this court is a motion by defendant Things Remembered, Inc. ("TR") for transfer of venue to the U.S. Bankruptcy Court, Southern District, New York. A pre-trial conference was held on these motions and no hearings were requested by the parties and the court finds counsel has waived any request for a hearing. Upon review of the record and pleadings, this court concludes that the removal was proper and the motion for transfer of venue shall be granted. This court shall defer all other issues to the Bankruptcy Court, Southern District, New York.

Before discussing the applicable law, a brief review of the background of this proceeding is necessary.

TR and Child World, Inc. ("Child World") jointly filed a notice of removal in this court and the U.S. District Court, Northern District of Ohio, on September 25, 1992, on an action pending against them in the court of Common Pleas, Summit County, Ohio, being titled Petrarca v. Child World, Inc., et al., Case No. CV-92-03-1069 (the "State Action").

Prior to the removal, on March 18, 1992, Petrarca commenced the State Action against Child World and Cole National Corporation ("Cole"). TR is a successor, by merger, to Cole. The basis of the State Action relates to Child World's alleged breach for failure to pay rent under two commercial lease agreements. The parties to the leases are Petrarca and Child World. The State Action also seeks payment from Cole based upon an alleged guaranty of the performance of Child World under the leases. Child World filed for protection under chapter 11 of the U.S. Bankruptcy Code on May 6, 1992 in the U.S. Bankruptcy Court, Southern District, New York.

On August 28, 1992 Petrarca filed its first amended complaint (the "amended complaint") in the State Action. (See, Exhibit D to Motion to Remand.) The amended complaint indicates that Child World had filed for chapter 11 protection and also alleges additional lease claims against Child World and TR.

The leases in the State Action have been rejected in the Child World Bankruptcy case pursuant to applicable bankruptcy law.

In the State Action, TR also filed a motion to dismiss Petrarca's amended complaint or stay proceedings related thereto until the Bankruptcy Court, Southern District, New York, has determined the extent of Child World's obligations, as tenant, under the leases.

Also pending, from the District Court file records, is a motion filed by National Fire Insurance Company of Hartford to intervene in this proceeding.

On March 8, 1993, TR and Colfax Manor Gardens, a counterclaim defendant, filed a stipulated notice of dismissal which dismissed a third party complaint filed against Colfax Gardens.

On March 26, 1993, the removal action pending in District Court was transferred and consolidated with the removal filed in this court. Although other motions have been filed, this court will only address whether the removal of this action was proper in order to confer jurisdiction on this court.

This court has reviewed the decision of Judge Speer in In re Aztec Industries, Inc., 84 B.R. 464 (Bankr. N.D. Ohio 1987) and finds the facts similar to this case and also finds his reasoning persuasive. In Aztec a state action was removed to the bankruptcy court, and a motion to transfer the removed case to the bankruptcy court in Oklahoma was filed. Judge Speer determined that he was required to review the jurisdictional issues only. The action was found to be properly removed and the motion to transfer was granted. Judge Speer noted that the "home" bankruptcy court in Oklahoma was more familiar with the pending bankruptcy case and what would be required for efficient

administration. Judge Speer followed the rationale of a similar case and stated:

> the proper role of the "conduit" court was to transfer the action to the "home" Bankruptcy Court to decide the issue of whether to remand or abstain from hearing the action.

Id. at 467 citing In re Convent Guardian Corp., 75 B.R. 346, 347 (Bankr. E.D. Pa. 1987).

This court agrees with Judge Speer and, accordingly, will only address the issue of removal to determine if this court has proper jurisdiction of this matter.

Petrarca contends the State Action should be remanded because this case was wrongfully removed to this court. Petrarca also requests this court order TR to pay its costs and fees as a result of the alleged wrongful removal.

Petrarca contends the removal was improper because: (1) it was not timely filed; and (2) TR has waived its right to removal because it filed permissive offensive counterclaims and crossclaims.

Although TR indicates it "attempted to be as concise as possible" it has submitted an exhaustive 38 page memorandum in opposition to the motion to remand. In its effort to be concise, TR has included string cites for fundamental propositions of law, many of these string cites exceed one page. See, eg. pp. 9-10; pp. 15-16. TR also states Petrarca's 27 page memorandum in support exceeds the 15 page limit of Local Rule 8:8.1(f). TR was granted leave to file its 38 page memorandum. This court takes note that Petrarca's memorandum exceeds the 15 page limit

without court approval. However, after reviewing both memoranda, this court's only comment is that if the 15 page limit was observed by both sides, all parties to this action would have been better served by their counsel.

The Removal to District Court

TR contends it timely removed the State Action to District Court because it did not become removable until after the amended complaint was filed on August 28, 1992.

28 U.S.C. §1446(b) states, in relevant part:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

TR contends it received the amended complaint on August 31, 1992, which contained ten additional counts on additional lease guaranties which required the application of federal bankruptcy law. Thus, TR states, its removal filed on September 25, 1992 was within the 30 day period under §1446(b).

This court agrees with TR. The court has reviewed the original complaint and the amended complaint (Notice

of Removal, Exhibits 1 and 27) and finds that the parties are the same and the only change in the amended complaint is the addition of ten claims based on other leases and guaranties between the parties. The new claims against TR address additional leases and also indicate that Child World is operating under federal bankruptcy law protection. The claims are state law claims but, because they involve lease rejection and guaranty claims, they are specifically and exclusively addressed in the bankruptcy code. Thus, it is the opinion of this court that the action became removable to District Court upon the service of the amended complaint which indicated Child World had filed a petition in bankruptcy. Thus, the notice of removal filed on September 25, 1992 in the District Court was timely under §1446(b). Striff v. Mason, 849 F.2d 240, 244 (6th Cir. 1988) (an action may be removed "where the real nature of the claim asserted in the complaint is federal, irrespective of whether it is so characterized"); E.W. Bowman, Inc. v Norfolk and Western Railway Co., 403 F. Supp. 389, 390 (W.D. Pa. 1975) "([federal] question must appear in plaintiff's complaint by direct and positive allegations or by necessary implication from the matters alleged").

The Removal to Bankruptcy Court

Federal Rule of Bankruptcy Procedure ("Rule") 9027 addresses removal actions and provides, in relevant part:

> (2) TIME FOR FILING; CIVIL ACTION INITIATED BEFORE COMMENCEMENT OF THE CASE UNDER THE CODE. If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days

> after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under § 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.

Rule 9027(a)(2).

Petrarca contends the removal to this court was outside the 90 day time period and, therefore, must be remanded. This court agrees that the removal to this court was untimely. In reviewing Rule 9027, it appears that the 90 day time limit is the only provision applicable to this case. There is no indication before this court that an applicable order for relief from stay was entered or that a chapter 11 trustee has been appointed in the Child World case. The State Action was initiated before the bankruptcy filing of Child World on May 6, 1992, thus, the removal had to be filed no later than 90 days thereafter, which is August 5, 1992. However, the notice of removal was filed on September 25, 1992 in this court, clearly beyond the time limit. Thus, this court finds the bankruptcy removal is untimely.

However, because the removal was timely filed in the District Court, as stated earlier, and subsequently consolidated with the pleadings filed herein, this court finds that TR has filed a timely removal.

Petrarca also argues that TR has waived its right to remove this action by filing permissive offensive counterclaims and crossclaims in the state court. TR

responds that it could not have waived its right to removal when it filed the counterclaims and crossclaims on June 26, 1992, because it had no right to remove until the amended complaint was later filed and served August 31, 1992.

This court agrees with TR's position. Petrarca argues that a waiver of a right to removal occurs when a defendant files a permissive pleading seeking affirmative relief and cites in support, inter alia, Bedell vs. H.R.C. Ltd., 522 F. Supp. 732 (E.D. KY. 1981).

In Bedell the court explained that a defendant may waive its right to remove an action by taking certain acts in state court that are deemed to constitute a submission to its jurisdiction. 522 F. Supp. at 737. Such acts may include the filing of a permissive crossclaim. Id. Other acts that could result in a waiver of the right to remove are the filing of pleadings seeking affirmative relief resulting in an adjudication on the merits of an issue which could result in the dismissal of the action in whole or in part. Id. at 738.

This court does not disagree with the holding in Bedell but does find another case cited more instructive. The court in Bolivar Sand Company, Inc. v. Allied Equipment, Inc., 631 F. Supp. 171, 172 (W.D. Tenn. 1986) explains that a right to remove can only be waived by actions of the defendant after the case clearly becomes removable. See also Johnson v. Celotex Corp., 701 F. Supp. 553, 554 (D.Md. 1988).

Accordingly, in the context of this case, because TR's right to remove the state court action on federal question grounds did not arise until August 31, 1992 (the date on which it first received a copy of Petrarca's amended complaint), very simply, whatever TR or Child World did

prior to that date could not possibly have constituted a waiver of the right to remove this action.

This court finds that TR did not waive its right to remove this action and removal was proper. Therefore, this court finds it has jurisdiction to consider the motion to transfer venue. Furthermore, as this court finds that removal was proper Petrarca's motion for costs and fees incurred as a result of removal shall be denied.

Motion to Transfer Venue

TR requests this court transfer this proceeding to the Bankruptcy Court in the Southern District of New York, where the Child World case is currently pending. TR relies on Aztec, supra, and Dunkirk Limited Partnership v. TJX Companies, Inc., 139 B.R. 643 (N.D. Ohio 1992).

This court agrees with the holding in Aztec that this action should be transferred to the "home" bankruptcy court in New York. As discussed earlier, this court finds this action was properly removed and thus, jurisdiction is proper to consider the motion to transfer venue.

Accordingly, this court adopts the sound reasoning of Judge Speer in Aztec at page 467:

> In addition, the Court which would try the case can better evaluate all the interests involved, and determine its own expertise in the particular areas of the law which form the basis of the action, as well as its own scheduling and time constraints. This [conduit] Court's speculation on these matters would not be an adequate substitute

> for a knowledgeable determination based upon the actual facts and circumstances. Moreover, allowing the Oklahoma Court to rule on the remand issues minimizes the potential conflicts which could arise due to differences in controlling authority between the Courts. Accordingly, a final ruling on the venue issues, and the many sub-issues which have been raised within the context of venue, remand, and abstention, should be left to the "home" Bankruptcy Court in Oklahoma.

This court also finds Dunkirk persuasive authority wherein Judge Battisti enforced a stay of a removed state action based upon a lease dispute. The Dunkirk court held that allowing the action to go forward in state court "would be contrary to federal policies designed to reach just and efficient results by bringing together as much as possible litigation affecting a bankrupt estate". Id. at 647.

Therefore, based upon the foregoing, this court shall enter a separate order denying Petrarca's motion for costs and fees and granting the motion of Things Remembered to transfer venue to the Bankruptcy Court for the Southern District of New York.

June 25, 1993

/s/ H. F. White
H. F. WHITE
Bankruptcy Judge

[Certificate of Mailing Omitted in Printing]

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	)	ADVERSARY
	)	PROCEEDING 92-5207
ANTHONY PETRARCA,	)	
	)	
Plaintiff,	)	RELATED CASE
	)	CHILD WORLD, INC.
vs.	)	CHAPTER 11 PENDING
	)	IN THE BANKRUPTCY
CHILD WORLD, INC.,	)	COURT FOR THE
et al.	)	SOUTHERN DISTRICT
	)	OF NEW YORK CASE
Defendant	)	NO. 92 B20 887(HS)

ORDER GRANTING MOTION TO TRANSFER VENUE AND DENYING MOTION FOR COSTS AND FEES

Based upon the "Memorandum of Decision on Motion to Remand and Motion to Transfer Venue" entered by this court on the 25 day of June, 1993;

It is the order of this court that the motion for costs and expenses related the removal of this action filed by Anthony A. Petrarca is DENIED;

It is the further order of this court that the motion filed by Things Remembered, Inc., to transfer venue of this action to the U.S. Bankruptcy Court, Southern District of New York, wherein is pending the related case Child World, Inc., case no. 92 B20 887(HS) is GRANTED.

So ordered this 25 day of June, 1993.

/s/ H. F. White
H. F. WHITE
Bankruptcy Judge

[Certificate of Mailing Omitted in Printing]

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Anthony A. Petrarca,	)	**CASE NO. 5:93-CV-1582**
	)	
Plaintiff/Appellant,	)	**BANKRUPTCY CASE NO.**
	)	92-5207
- vs -	)	
	)	Judge Sam H. Bell
Things Remembered, Inc.,	)	
	)	
Defendant/	)	**ORDER**
Appellee	)	

Presently before the court is Plaintiff-Appellant Anthony Petrarca's appeal from the U.S. Bankruptcy Court for the Northern District of Ohio's order granting Defendant/Appellee's motion to transfer venue (docket #9).

STATEMENT OF FACTS

The plaintiff, Anthony Petrarca, initiated this action in the Court of Common Pleas, Summit County, Ohio on March 18, 1992. His four count complaint asserted claims against Child World as lessee and Cole National as guarantor for delinquent rents, future rents (pursuant to an acceleration clause), unpaid common area maintenance costs, taxes, insurance, and late fees from two leases. On April 14, 1992 Things Remembered, Inc. ("TRI")

voluntarily entered the case as the successor by merger to Cole National and filed for Leave to Plead.

On May 6, 1992, Child World filed Chapter 11 petitions in the U.S. Bankruptcy Court for the Southern District of New York. Child World filed a suggestion of stay in the Summit County Common Pleas Court on May 11, 1992, and that court transferred the case (against only Child World) to its inactive docket on May 22. Child World simultaneously rejected the leases.

TRI filed its answer to Petrarca's complaint on May 28, 1992; it filed an amended answer with counterclaims against Petrarca and Colfax Manor Gardens on June 26, claiming that its guarantees were limited and that Petrarca's assignment of the leases to Colfax without Cole National or TRI's consent discharged TRI of its obligations. TRI also claimed in the amended answer that Child World's Chapter 11 bankruptcy filing allowed Child World to reject the leases.

On August 28, 1992, Petrarca filed an amended complaint bringing ten additional claims regarding five other leases against TRI and Cole National. Recognizing Child World's Chapter 11 status and the Summit County stay, Petrarca did not bring any additional claims against Child World.

On September 25, 1992, TRI filed Notices of Removal in the Summit County court, the U.S. Bankruptcy Court for the Northern District of Ohio, and the United

States District Court for the Northern District of Ohio.[1] In support of removal, TRI argued that only the home bankruptcy court in New York could determine the extent of Petrarca's lease rejection damages, if any, after determining Child World's obligations under the leases. This being true, TRI reasoned, TRI's obligations as Child World's guarantor must also be measured by, or with reference to, Child World's obligations as determined under the bankruptcy code. Accordingly, TRI explained, the matter involved a federal question and was properly removed pursuant to 28 U.S.C. §1441. Relying upon the same assumptions, TRI further reasoned that the case was "related to" Child World's bankruptcy proceeding in New York and was therefore removable under 28 U.S.C. §1452.

Plaintiff filed a motion to remand with the district court on October 23, 1992. Judge Aldrich eventually transferred the district court case to the bankruptcy court for

---

[1] There remains a fair amount of confusion among courts concerning whether notices of removal taken pursuant to 28 U.S.C. §1452 are properly filed with the bankruptcy court instead of the district court. See In re Aztec Industries, Inc., 84 B.R. 464, 468 (Bankr. N.D. Ohio 1987) (holding that petition may be filed directly with the bankruptcy court and citing supporting, as well as contradictory, authority). TRI's decision to file notices with both the district and the bankruptcy court may fairly be seen as an act of caution given the existing uncertainty. The unfortunate consequence of this dual filing was the engendering of separate proceedings involving one and the same action within a single court system.

Although the two matters were ultimately "consolidated" by the district court, a more appropriate course, it seems, would have called for this court to determine whether it or the bankruptcy court properly retained jurisdiction over the matter. While TRI presumably had two adequate, independent bases for removal, it plainly did not have two separately removable actions.

consolidation with the matter pending before Bankruptcy Judge White.

On May 25, 1993, the Ohio bankruptcy court granted a motion by TRI to transfer venue to the United States Bankruptcy Court for the Southern District of Ohio. In so doing, Judge White determined that the notices of removal were timely filed, that TRI had not waived the right to remove the action, and that the court's sole role as a "conduit" bankruptcy court was to transfer the case to the "home" court in New York.

Petrarca now appeals Judge White's May 25, 1993 order.

LAW AND ANALYSIS

Petrarca raises three issues in its appeal. First and foremost, it challenges as erroneous the determination by the bankruptcy court that TRI timely removed the State action. Second, Petrarca claims that the bankruptcy court erred in finding that TRI did not waive its right to remove the action. Third, TRI [sic-Petrarca] objects to the bankruptcy court's refusal to abstain from hearing the removed action. Because the objections raised concern conclusions of law reached by the bankruptcy court, this Court reviews the matter de novo. In re Edward M. Johnson, 845 F. 2d 1395, 1398 (6th Cir. 1988).

I. Timeliness of Removal.

As mentioned above, TRI purported to remove this matter from state court pursuant to two independent federal statutes. Petrarca moved the bankruptcy court to remand the action for want of jurisdiction, arguing that TRI had failed to remove the matter within the time period provided

by either statute. The bankruptcy court held that TRI failed to remove the matter pursuant to §1452 (bankruptcy removal) of Title 28 in a timely manner. The bankruptcy court further held, however, that TRI's removal was timely under §1441 (federal question removal) of the same title, and, for that reason, the court believed itself to have jurisdiction to consider TRI's motion to transfer.

A. Timeliness of Federal Question Removal

Section 1331 of Title 28 provides the federal district courts original jurisdiction over all civil actions "arising under the Constitution, law, or treaties of the United States." 28 U.S.C. §1331. Section 1441 of the same title allows for the removal to federal district court of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction...." 28 U.S.C. §1441. As discussed above, because TRI believed the application and construction of Title 11 to be determinative of the present dispute, it relied in part upon §1441 in removing the action to the district court.

The chief issue of contention between the parties concerns the timeliness of TRI's notice of removal. At the core of this dispute is the language of 28 U.S.C. Section 1446(b), which sets forth the appropriate time frame for removing matters deemed removable under §1441. Section 1446(b) provides in relevant part:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is

> based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. §1441(b) (emphasis added).

Petrarca's original complaint did not, when filed, implicate the federal bankruptcy code or any other provisions of federal law. Therefore, it was not immediately removable, and the thirty day period in which to remove did not begin to run upon service of the summons as provided in the first paragraph of §1446(b). Rather, the filing period commenced "after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper form which it ... [was ascertainable] that the case [was]" removable. The pertinent question for our immediate purpose thus becomes, "What form of notice to the defendant is required to trigger the clock on the thirty-day filing period provided in the second paragraph of §1446(b)?"

Two competing views have polarized courts faced with the same question. Many courts interpret §1446(b) strictly to require that the defendant receive formal notice from a voluntary act of filing taken by the plaintiff. Apache Nitrogen Products, Inc. v. Harbor Insurance Co., 145 F.R.D. 674 (D. Ariz. 1993); Phillips v. Allstate Insurance Co., 702 F. Supp. 1466 (D. Cal. 1989); Jong v. General Motors Corporation, 359 F. Supp. 223 (N.D. Cal. 1973). Under this view, unless the grounds for removal appear on the face of a pleading or other filing by the plaintiff, the defendant is free to rest upon his right to remove, regardless of his actual knowledge of grounds upon which to do so. See, e.g., Jong, 359 F. Supp. at 226 ("Therefore, the time period to remove an action cannot depend on defendant's actual knowledge, because the statute expressly allows a defendant to rely on papers presented to it.").

Consistent with this line of authority, TRI argues that the thirty-day period in which it could remove this action began on August 31, 1992 -- the date on which Petrarca served TRI with a paper (its amended complaint) containing specific reference to Child World's bankruptcy.

Judge White accepted as persuasive TRI's arguments and authority, holding "the action became removable to District Court upon the service of the amended complaint on August 31 which indicated Child World had filed a petition in bankruptcy." Memorandum of Decision filed June 25, 1993, p. 5. Thus, he concluded, TRI's notice of removal filed September 25, 1992 was timely. Id.

Petrarca finds fault with the Bankruptcy Court's narrow reading of §1446(b)'s notice requirement because such a reading ignores TRI's actual knowledge of grounds for removal. Adopting the alternative view, Petrarca insists

that the removal period commenced on May 6, 1992 when Child World filed its petition for relief under Chapter 11 and thereby gave TRI actual, if not formal, notice of such grounds.

Petrarca is not alone in arguing the propriety of construing §1446(b)'s notice requirement liberally. See e.g. Mielke v. Allstate Ins. Co., 472 F. Supp. (E.D. Mich. 1979) (no additional time for removal is allowed if the presence of removal grounds is unambiguous in light of the defendant's knowledge and the claims of the initial complaint); Weaver v. Miller Electric Mfg. Co., Inc., 616 F. Supp. 683 (S.D. Ala. 1985) (the defendant should remove the case if it comes by knowledge, independent of the plaintiff, requiring removal and should not sit upon its rights). In their widely regarded treatise, Wright, Miller and Cooper opine that §1446(b)'s "clear purpose to commence the running of the thirty-day period once the defendant receives actual notice that the case has become removable ...." C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters, §3732, p. 520 (1985) (emphasis added).

This Court need not weigh afresh the competing arguments concerning the form of notice necessary to start §1446(b)'s thirty-day clock; the Sixth Circuit Court of Appeals has already considered and answered the question. In Holston v. Carolina Freight Carriers Corp., No. 90-1358, 1991 WL 112809, at **3 (6th Cir. June 26, 1991), the court held:

> 1446(b) starts the thirty-day period running from the date that a defendant has solid and unambiguous information that the case is removable, even if that information is solely

> within its own possession.....Any ambiguity regarding the scope of 1446(b) must be resolved in favor of remand to the state courts.

Believing §1446(b) to be ambiguous on its face, the court construed the statute so as to prevent a defendant from "sit[ting] upon information in its possession until it feels the time is right to trigger removal ..." after having forced the plaintiff to exhaust his resources in the state court. Id. at **4. In so doing, the court specifically discounted the applicability of the "Voluntary Act" doctrine in matters involving federal question (as opposed to diversity) removal. Id. at **5.

Holden teaches that §1446(b)'s thirty-day filing period commences once the defendant gains "solid and unambiguous information that the case is removable," regardless of the source of that information. Id. at **3. Petrarca contends that TRI received actual notice that the case was removable on May 6, 1992 when Child World filed chapter 11 petitions. TRI claims that it did not have notice until August 31, 1992 when it was served with Petrarca's amended complaint bringing new claims for other leases which involved the application of bankruptcy law.

The facts and pleadings placed before this Court demonstrate that the Petrarca's amended complaint was merely the procedural tool with which TRI procured removal as opposed to the actual source from which TRI discovered the basis for that removal. The amended complaint does not allege facts concerning Child World's bankruptcy petition which were unknown to TRI. Given the corporate relationship between the two defendants, it is nearly impossible to imagine that TRI was unaware on

May 6, 1992 that Child World was filing a bankruptcy petition. Assuming arguendo it was unaware on May 6, it plainly had knowledge of the bankruptcy proceedings on June 26, 1992, the date on which it filed its amended answer. In that answer, TRI pointed to Child World's petition as justification for Child World's rejection of its leases. Thus, TRI plainly had solid, unambiguous information form which it had received actual notice of the bankruptcy by June 26, 1992. This being true, the September 25, 1992 notice of removal was plainly without the thirty-day period for removal provided by §1446(b).

B. Timeliness of the bankruptcy court removal

Having determined that TRI did not timely remove this matter pursuant to 28 U.S.C. §§1441 and 1446, the Court considers whether TRI nonetheless properly removed it under 28 U.S.C. §1452. Section 1452 provides specifically for the removal of claims related to bankruptcy cases. It states in part:

> (a) A party may remove any claim or cause of action in civil action ... to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334[2] of this title.

28 U.S.C. §1452.

---

[2] Section 1334 provides the district courts with original jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §1334.

Bankruptcy Rule 9027 (titled "Notice of Removal") places temporal limitations upon the removal of claims or causes under §1452. In re Aztec Industries, Inc., 84 B.R. 464, 469 (Bankr. N.D. Ohio 1987). Rule 9027(a) provides in part:

> (2) If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay if the claim or cause of action in a civil action has been stayed under Section 362 of the Code, or (C) 30 days after a trustee qualifies in a Chapter 11 reorganization case but not later than 180 days after the order for relief.
>
> (3) If a case under the Code is pending when a claim or cause of action is asserted in another court, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

Bankruptcy Rule 9027(a)(2) & (3).

Petrarca initiated the state action on March 18, 1992. The "related" case under the bankruptcy code commenced on May 6 of the same year when Child World filed its Chapter 11 petitions in New York. Since the Ohio state action preceded the related bankruptcy action, the bankruptcy court for this district applied the ninety-day limit provided in sub-section (a)(2) of Rule 9027 to determine the timeliness of TRI's removal under 1452. The ninety-day period ended on August 5, 1992; accordingly, the bankruptcy court concluded that TRI's September 25 removal was not timely under §1452.[3]

Contesting this conclusion, TRI distinguishes claim removal from removal of an entire cause of action, noting that §1452 allows a party to remove individual claims to bankruptcy court without removing the entire lawsuit. Because ten of the removed claims (those added by Petrarca in its August 8, 1992 amended complaint) had not yet been filed when the ninety-day period provided by Rule 9027(a)(2) expired, TRI reasons, it was impossible for TRI to remove those claims within the ninety-day window. Rather, TRI implies, it had -- consistent with Rule 9027(a)(3) -- an additional thirty-days from receipt of the amended complaint in which to remove the new claims set forth therein.

The Bankruptcy Court for the Northern District of Texas, when considering whether an amendment to the plaintiff's pleadings operates to extend the removal period provided by Rule 9027, turned to 28 U.S. C. §1446 for guidance, observing:

---

[3] Because it believed TRI's removal to be timely pursuant to 28 U.S.C. §§1331 & 1346, however, the bankruptcy court declined to remand the action.

> Bankruptcy Rule 9027 substantially conforms to the language and procedure of 28 U.S.C. §1446. There is no case law to guide this Court on the effect of amended pleadings on the removal of cases under 28 U.S.C. §1478 [since repealed and replaced by 28 U.S.C. §1452] and Bankruptcy Rule 9027. This Court must rely on decisions concerning the removal of state court actions to United States district under 28 U.S.C. §1446 for guidance since federal law controls.

In Re Shaffer, 42 B.R. 522, 525 (Bankr. N.D. Tex. 1984). Having conducted an extensive search, this court has found no authority offering a mere [sic] persuasive method of analysis than that employed in Shaffer. That court's reliance on §1446 seems prudent and leads to a logical resolution of the problem before us.

As discussed previously, 28 U.S.C. §1446 allows for removal from state to district court: (1) within thirty days after service of the initial pleading setting forth the removable claim; or (2) "if the case stated by the initial pleading is not removable," within thirty days of receipt by defendant of information demonstrating that the matter has become removable. Thus, "[u]nless the amendment gives rise to another removable basis, a party will not acquire an additional thirty days in which he or she can remove his or her case." Shaffer, 42 B.R. at 525 (emphasis added).

Were it true that Petrarca's amended complaint presented for the first time removable claims, this Court might be persuaded that TRI had thirty more days in which to remove those claims. Under the circumstances presented, however, this court feels the bankruptcy court

properly held that TRI failed to remove its case pursuant to §1452 in a timely fashion.

As previously observed, the ten claims added by Petrarca's amended complaint were predicated upon grounds identical to those underlying the two claims comprising the initial complaint. Accordingly, if -- as TRI alleges -- the added claims were removable because they were related to Child World's bankruptcy, so too were the original claims. Thus, the original cause of action was pending and removable within the purview of Rule 9027(a) when Child World filed for Chapter 11 protection on May 6, 1992. TRI's opportunity to remove that cause (or any single claim therein) pursuant to §1452 and Rule 9027(a) rose on May 6 and expired ninety days thereafter. The "new" claims asserted in the amended complaint did not enable TRI to revive its lost removal option since they neither added nor substantially altered the basis for removal.

II. Remaining Issues on Appeal.

Having determined that the notices of removal were filed untimely, and thus that the bankruptcy court lacked jurisdiction over this matter, this Court need not address the issues of abstention and waiver raised on appeal.

CONCLUSION

For the foregoing reasons, the Bankruptcy Court's order denying Plaintiff's motion to remand and granting Defendant's motion to transfer venue is reversed. The case

is remanded to the Bankruptcy Court for further proceedings consistent with this order.

IT IS SO ORDERED.

/s/ Sam H. Bell
SAM H. BELL
United States District Judge

APPENDIX C

No. 94-3980

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY A. PETRARCA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	O R D E R
	)	
THINGS REMEMBERED, INC.,	)	
	)	
Defendant-Appellant	)	

Defendant filed a notice of appeal of the order of the district court remanding this action to the bankruptcy court for the purposes of remanding it to the state court from which it had been removed. The district court concluded that defendant's notices of removal pursuant to both 28 U.S.C. § 1441 and 28 U.S.C. § 1452 were untimely. Consequently, the bankruptcy court lacked jurisdiction.

As a general rule, an order remanding an action to a state court from which is [sic] was removed is not reviewable on appeal or otherwise. 28 U.S.C. §§1447(d) and 1452(b); *see State of Ohio v. Wright,* 992 F. 2d 616 (6th Cir. 1993) (en banc); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F. 2d 1341 (6th Cir. 1993); *Boone Coal*

and Timber Co. v. Polan, 787 F. 2d 1056, 1061 (6th Cir. 1986). It does not appear, therefore, that the order of the district court is an appealable order.

Defendant is hereby direct [sic] to show cause, within twenty-one days of the entry of this order, why this appeal should not be dismissed for lack of jurisdiction.

ENTERED PURSUANT TO RULE 8(b)
SIXTH CIRCUIT RULES

Leonard Green, Clerk

/s/ Leonard Green

APPENDIX D

No. 94-3980

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY A. PETRARCA, Plaintiff-Appellee, v. THINGS REMEMBERED, INC., Defendant-Appellant.	)	O R D E R
	)	NOT RECOMMENDED FOR FULL TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the court. This notice is to be prominently displayed if this decision is reproduced.

Before: MARTIN and BATCHELDER, Circuit Judges; and ENSLEN, District Judge.*

This action, initially filed in the Court of Common Pleas of Summit County, was removed by defendant pursuant to 28 U.S.C. §§ 1441 and 1452. Finding that the notices of removal were not timely filed, the district court remanded the action to state court. Defendant filed a notice of appeal of the remand order. In response to a show cause order issued by the court, defendant argues that the remand

* The Honorable Richard A. Enslen, United States District Judge for the Eastern District of Michigan, sitting by designation.

order is reviewable on appeal. Plaintiff asserts that the court lacks jurisdiction to consider the appeal.

As a general rule, an order remanding an action to a state court from which it was removed "is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). Defendant argues that this general prohibition against appellate review is not applicable because this action was removed and remanded pursuant to the bankruptcy removal statute, 28 U.S.C. § 1452. The record clearly demonstrates that defendant sought removal pursuant to the general removal statute and that the district court held that the notice of removal was not filed, within the time required by 28 U.S.C. § 1446(b). Thus, section 1447(d) prohibits review of that ruling. *See Ohio v. Wright*, 992 F.2d 616, 618-19 (6th Cir. 1993); *Baldridge v. Kentucky-Ohio Transportation, Inc.*, 983 F.2d 1341, 1343-50 (6th Cir. 1993). In addition, the district court held that the notice of removal pursuant to section 1452 was not timely filed. Appellate review of that ruling is likewise barred. *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1225-26, (7th Cir. 1991); *Sykes v. Texas Air Corp.*, 834 F.2d 488, 590-91, (5th Cir. 1987); *Boone Coal and Timber Co. v. Polan*, 787 F.2d 1056, 1060, (6th Cir. 1986); *see United States v. Rice*, 327 U.S. 742, 752 (1946).

It therefore is ORDERED that the appeal is dismissed *sua sponte* for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX E

No. 94-3980

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: CHILD WORLD, INC.	)	
----------	)	
ANTHONY A. PETRARCA,	)	
	)	
Appellee,	)	
	)	
v.	)	ORDER
	)	
THINGS REMEMBERED, INC.,	)	
	)	
Appellant.	)	

BEFORE: MARTIN and BATCHELDER, Circuit Judges; and ENSLEN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

---

* Hon. Richard A. Enslen, United States District Judge for the Western District of Michigan, sitting by designation

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Supreme Court, U.S.
FILED
JUN 15 1995
OFFICE OF THE CLERK

(4)

No. 94-1530

In the Supreme Court of the United States

OCTOBER TERM, 1994

THINGS REMEMBERED, INC.,

Petitioner,

v.

ANTHONY A. PETRARCA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether an order remanding a case on other than "any equitable ground," which case had been removed pursuant to 28 U.S.C. § 1452, is reviewable by the court of appeals.

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Hernandez v. Brakegate, Ltd., 942 F.2d 1223 (7th Cir. 1991) . . . . . *passim*

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South Windsor Convalescent Home, Inc. v. Mathews, 541 F.2d 910 (2d Cir. 1976) 18

Sykes v. Texas Air Corp., 834 F.2d 488 (5th Cir. 1987) . . . . . *passim*

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28 U.S.C. § 1334 . . . . . *passim*

28 U.S.C. § 1441 . . . . . *passim*

28 U.S.C. § 1446 . . . . . *passim*

28 U.S.C. § 1447 . . . . . *passim*

28 U.S.C. § 1452 . . . . . *passim*

No. 94-1530

In the Supreme Court of the United States

OCTOBER TERM, 1994

THINGS REMEMBERED, INC.,

Petitioner,

v.

ANTHONY A. PETRARCA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion and Order of the United States Court of Appeals for the Sixth Circuit is set forth as Appendix D in the Joint Appendix (J.A. 35a). That Order dismissed the appeal from the Order of the United States District Court for the Northern District of Ohio, set forth as Appendix C in the Joint Appendix (J.A. 18a). The Memorandum and Order of the United States Bankruptcy Court for the Northern District of Ohio are set forth as Appendices A and

B, respectively, in the Joint Appendix (J.A. 6a, 16a). None of the opinions below are reported in the official reports.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Order dismissing Things Remembered, Inc.'s appeal to that court on November 15, 1994 and, on January 12, 1995, denied Petitioner's petition for rehearing with suggestion for rehearing en banc. Things Remembered, Inc. filed its petition for writ of certiorari on March 10, 1995. The petition was granted on May 1, 1995.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Primarily, this case concerns the meaning and application of 28 U.S.C. § 1452. A related issue involves a comparison of and contrast between the appealability bars in two statutory provisions, 28 U.S.C. § 1452(b) and 28 U.S.C. § 1447(d), and, more generally, the differences between the bankruptcy removal scheme in § 1452 and Fed. R. Bankr. P. 9027 and the general removal scheme in 28 U.S.C. §§ 1441, 1446-1447. Other statutes and rules, listed in the Table of Authorities, are relevant to that comparison and contrast.

The Appendix to this brief sets forth pertinent provisions of the following texts: 28 U.S.C. §§ 1334, 1441, 1446, 1447, 1452, and Fed. R. Bankr. P. 9027. Some of the key cases discussed in this brief are decided under

§ 1452's statutory predecessor, 28 U.S.C. § 1478. That superseded statute is set forth, in italic type, at A-9.

STATEMENT OF THE CASE

In March 1992 Anthony A. Petrarca ("Petrarca") sued Child World, Inc. ("Child World") and Cole National Corporation[1] in the Summit County, Ohio, Court of Common Pleas (the "State Court"). *Petrarca v. Child World, Inc., et al.*, Case No. CV 92 03 1069. Petrarca alleged that Child World had breached leases for certain real property in Denver, Colorado, and Wichita, Kansas, and that Things Remembered had breached its limited, conditional guaranty of Child World's obligations under the Denver lease. The damages alleged as against Things Remembered totaled approximately $2.8 million.

Child World filed, on May 6, 1992, a petition under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of New York. *In re Child World, Inc.*, Chapter 11 Case No. 92 B 20887 (HS). Pursuant to 11 U.S.C. § 365(a), that Bankruptcy Court authorized Child World's rejection of the Denver and Wichita leases that were the basis for Petrarca's State Court complaint.

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[1] Petitioner Things Remembered, Inc. is successor in interest by merger to Cole National Corporation. For ease of reference, and because any liabilities of Cole National Corporation in this litigation are those of Things Remembered, both will be referred to interchangeably in the Statement of the Case as "Things Remembered" and, in the Argument, as "Petitioner."

Pursuant to Supreme Court Rule 29.1, Things Remembered states that its corporate parent is Cole National Group, Inc., and that its only subsidiary is Cole Management Services, Inc.

On August 28, 1992, Petrarca filed an amended complaint in State Court which added ten new counts against Things Remembered only. In the new counts, Petrarca alleged new claims relating to different guaranties of different properties in Ft. Wayne, Indiana; Lancaster, Pennsylvania; Akron, Ohio; Westland, Michigan; and Peoria, Illinois. The amended complaint added new damage claims totaling approximately $12.3 million.

Less than 30 days later, on September 25, 1992, Things Remembered removed the claims in the amended complaint to the United States District and Bankruptcy Courts for the Northern District of Ohio.[2] Both removals were taken "pursuant to 28 U.S.C. § 1331, § 1334(b), § 1441, § 1446, § 1452, and Bankruptcy Rule 9027." The District Court consolidated the removed case filed in that court with the removed case filed in the Bankruptcy Court.

On competing motions (Petrarca's for remand and Things Remembered's for transfer of venue to the Child World "home" bankruptcy court in the Southern District of New York[3]) the Bankruptcy Court, relying on *In re Aztec*

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[2] As the District Court in this case observed in its Order on appeal from the Bankruptcy Court's ruling, there is "a fair amount of confusion among the courts concerning whether notices of removal taken pursuant to 28 U.S.C. § 1452 are properly filed with the bankruptcy court instead of the district court," and "Things Remembered's decision to file notices with both the district and the bankruptcy court may fairly be seen as an act of caution given the existing uncertainty." (J.A. 20a n.1).

[3] The basis for Things Remembered's motion to transfer venue, and indeed for the removal itself, was that Petrarca's claims against Things Remembered "arose in" or were "related to" the Child World bankruptcy proceedings, *see* 28 U.S.C. § 1334(b), and hence were removable under authority of 28 U.S.C. § 1452. The jurisdictional nexus exists because (continued...)

Industries, Inc., 84 B.R. 464 (Bankr. N.D. Ohio 1987), ordered venue of the action transferred. (J.A. 8a, 14a-15a, 16a).

On Petrarca's appeal, the District Court reversed. That court held, *inter alia*, that Things Remembered's removal was untimely, whether measured by 28 U.S.C. § 1446(b) (as may be applicable to any general removal under 28 U.S.C. § 1441) or by Rule 9027 of the Federal Rules of Bankruptcy Procedure (as would be applicable to a removal under 28 U.S.C. § 1452). In either event, the District Court held, the time for removal arose on the day when Child World filed its Chapter 11 petition (or, alternatively as to the § 1441 aspect of the removal only, on a later date when Things Remembered filed its amended answer which made reference to the bankruptcy (J.A. 27a)) -- notwithstanding that by neither date had any of the new

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[3](...continued)
Things Remembered's guaranties were limited, by their express terms, to payment of Child World's "obligations" under its leases (whatever those obligations may be determined to be) not to performance or payment of the leases themselves. (For such a contractual limitation on a guaranty, *see, e.g., Western-Bank Downtown v. Carline*, 757 S.W.2d 111, 113 (Tex. App.-Houston [1st Dist] 1988)). Thus, notwithstanding 11 U.S.C. § 524(e), the question of the extent to which Petrarca could recover from Things Remembered upon the guaranties is a question that is controlled by Child World's "obligations" under the leases, as such "obligations" will be determined in the Bankruptcy Court after application of the limitation on lease rejection damages provided by 11 U.S.C. § 502(b)(6). Neither court below (Bankruptcy or District) has passed upon the existence of such a § 1334 jurisdictional nexus. The remand at issue herein was solely based upon a perceived procedural defect (timeliness) in removal.

claims added by Petrarca's amended complaint even been asserted.[4] Accordingly, the District Court held the removal to be procedurally improper, and reversed the Order of transfer and remanded the case to the Bankruptcy Court for further proceedings. (J.A. 18a, 31a-32a).

Things Remembered timely appealed this procedural remand in order to assert and protect its right to a federal forum, *see* note 3, *supra*. The Sixth Circuit, finding that, "[a]s a general rule, an order remanding an action to a state court from which is [*sic*] was removed is not reviewable on appeal or otherwise," (J.A. 35a-36a), ordered Things Remembered to show cause why the appeal should not be dismissed. After that show cause Order was briefed, the Sixth Circuit dismissed the appeal.[5]

The Sixth Circuit cited two reasons for that dismissal: (1) that the District Court's ruling on the § 1441 removal to the district court (i.e., that it was untimely) was not appealable by virtue of 28 U.S.C. § 1447(d); and (2) that the District Court's ruling on the bankruptcy removal

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[4] In fact, the new claims were not asserted until three and a half months after the bankruptcy filing. In short, the District Court Order -- which found that the time for removal expired at the latest 90 days after the May 6, 1992 bankruptcy filing -- would require Things Remembered to remove claims before they were asserted. This is not and cannot be, Things Remembered submits, the law -- and that is the basis upon which Things Remembered appealed to the Sixth Circuit.

[5] The Sixth Circuit's Order to Show Cause directed the parties to brief only the issue of appealability, not the substantive issue upon which the appeal was taken. Accordingly, the Sixth Circuit did not consider Things Remembered's argument that the District Court had miscalculated the removal period and that, moreover, the result would, in some circumstances, allow a plaintiff to manipulate its pleading to completely foreclose a defendant's right to remove.

pursuant to 28 U.S.C. § 1452(b) (i.e., that it too was untimely) was likewise not appealable, on authority of three cases from the courts of appeals and one from this Court. (J.A. 36a). The Sixth Circuit did not address the contrary authority, or the distinction in 28 U.S.C. § 1452(b) between equitable and other remand orders.

Things Remembered's petition for writ of certiorari, filed on March 16, 1995, was granted on May 1, 1995. 115 S. Ct. 1821.

SUMMARY OF THE ARGUMENT

This case involves a federal appellate court's refusal to review a judgment of an inferior court where there is no prohibition of such review. The dismissal of Petitioner's appeal by the Sixth Circuit was erroneous because a claim or cause of action removed under 28 U.S.C. § 1452, then remanded on other than "any equitable ground," is appealable pursuant to 28 U.S.C. § 158(d). The issue presented in this case has been directly addressed by the circuit courts, which have split on precisely opposite sides of the question.

The merits of the District Court's remand Order are not before this Court, and so are discussed only when appropriate to an understanding of context, in footnotes in this brief. The only aspect of that Order which *is* directly relevant here is that it was *not* based "on any equitable ground."

Section I of this brief shows that appeal of the Order is not barred by § 1452(b), which precludes review only of remands made on "any equitable ground." Nor, as Section II of this brief demonstrates, is appeal barred by § 1447(d),

which precludes review only of remands premised on a lack of subject matter jurisdiction in a case in which the removal was effected pursuant to 28 U.S.C. § 1441.

For the reasons stated herein, the Sixth Circuit's Order should be reversed, and this case remanded to that court for consideration of the merits.

ARGUMENT

I.

APPELLATE REVIEW OF THE REMAND ORDER IS NOT BARRED BY § 1452(b)

As its title indicates, 28 U.S.C. § 1452 specifically governs "Removal of claims related to bankruptcy cases." Subsection (a) authorizes removal of causes of action and claims if there is jurisdiction under 28 U.S.C. § 1334. Subsection (b) governs remand of those causes of action or claims:

> The court to which such claim or cause of action is removed may remand such claim or cause of action *on any equitable ground*. An order entered *under this subsection* remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals . . .

(emphasis added). By its plain terms, subsection (b) bars appeal only of remands made on *equitable* grounds, and carves out, as not within its comprehension, remands on other than equitable grounds.

The remand Order below was not based "on any equitable ground"; indeed, no such ground was before the District Court. The Bankruptcy Court, following *In re Aztec Industries, Inc.*, 84 B.R. 464 (Bankr. N.D. Ohio 1987), explicitly declined to consider any issues other than timeliness of the removal: "Although other motions have been filed, this court will only address whether the removal of this action was proper in order to confer jurisdiction on this court." (J.A. 8a). Thus, both the Bankruptcy Court Order and the District Court remand concerned the purely procedural matter of timeliness, and there was no consideration given to "equitable" analysis. This was also explicitly recognized by the District Court, which stated that the objections on appeal from the Bankruptcy Court Order "concern conclusions of law reached by the bankruptcy court," thus making the District Court's review *de novo* (J.A. 21a). As the District Court concluded:

> Having determined that the notices of removal were filed untimely, and thus that the bankruptcy court lacked jurisdiction over this matter, this Court need not address the issues of abstention and waiver raised on appeal.

(J.A. 31a).

A. The Plain Language of § 1452 Should Be Given Effect to Allow Appeal of Remands Entered on Other Than "Any Equitable Ground"

Thus, by the plain language of § 1452(b), appeal of the District Court's Order is not barred. This was the precise holding of *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d

Cir. 1984).[6] *Pacor* held that "[s]ection 1478(a) [the predecessor of § 1452(a)] authorizes a very different type of removal than does section 1441," 743 F.2d at 991, and that the general removal provisions could not and should not be applied to bankruptcy removals. 743 F.2d at 991-92. It then read the reviewability bar of § 1478(b) by its plain language: i.e., that only remands on *equitable* grounds were not reviewable.

Since the *Pacor* district court had held that the original suit was not "related to" a bankruptcy proceeding, and thus that it lacked jurisdiction under the predecessor to 28 U.S.C. § 1334(b) such that the case would be remanded on that jurisdictional ground, the Third Circuit found no bar to appeal of the district court's jurisdictional remand. *Accord*, *In re National Developers, Inc.*, 803 F.2d 616, 619 (11th Cir. 1986) (adopting the reasoning of *Pacor* and *Browning v. Navarro*, 743 F.2d 1069, 1076 n.21 (5th Cir. 1984)); *see also National City Bank v. Coopers & Lybrand*, 802 F.2d 990 (8th Cir. 1986) (declining to hear appeal of remand order based on lack of federal question jurisdiction under § 1331, but accepting appellate jurisdiction over jurisdictional remand of bankruptcy removal to evaluate "related to" nexus).

In declining to accept appellate jurisdiction over this procedural remand, the Sixth Circuit relied in part on three circuit court cases, each of which, explicitly or implicitly, rewrites the statute in a way that standard canons of

[6] This Court recently examined *Pacor* in some detail, and approved its analysis as to another aspect of that case -- the scope of "related to" jurisdiction under 28 U.S.C. § 1334. *Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1499 (1995).

statutory construction, and this Court's decisions, will not permit.[7]

One of those, *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223 (7th Cir. 1991) holds, for example, that whatever the penultimate word in the first sentence of § 1452(b) may mean, it does not mean "equitable." This is so, that court held, because the "distinction between law and equity was abolished long ago." Accordingly, "'[e]quitable' in § 1452(b) makes more sense if it means 'appropriate.'" 942 F.2d at 1226. That this reading made "more sense" was based on several policy considerations, including that, in the court's view, "remands on procedural and jurisdictional grounds are largely mechanical, and 'equitable' remands are discretionary so that appellate review would be deferential." For these reasons, the court said, "the costs of delay are not worth bearing." 942 F.2d 1226. The court did not cite any legislative history, or other evidence that Congress agreed with its cost-balancing, for this conclusion.

Sykes v. Texas Air Corp., 834 F.2d 488 (5th Cir. 1987) also squarely considered, and rejected, the statutory language. Like *Hernandez*, *Sykes* recognized the absence of a bar to appeal of other than equitable remands in § 1452 but declined to give it effect, calling it "a sort of semantic crack in the statute." 834 F.2d at 490. That crack the *Sykes* court undertook to patch itself by application of its "sound

[7] Those three cases rely on two analytical justifications: first, that the statute cannot, for whatever reason, mean what its plain language says (or, that words that do not appear in the statute should be read into it), and second, that 28 U.S.C. § 1447(d) independently bars appeal. The first of these justifications is addressed here in Section I of this brief and the second in Section II.

appreciation of the strong congressional policy against review of remand orders." 834 F.2d at 490.

The third case cited by the Sixth Circuit was its own *Boone Coal and Timber Co. v. Polan*, 787 F.2d 1056 (6th Cir. 1986). *Boone Coal* rejected *Pacor*, instead finding a line of pre-*Sykes* Fifth Circuit cases more persuasive, including, primarily, *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984).

Boone Coal, however, greatly (and incorrectly) overstated *Browning*'s import. *Browning* was indeed germane authority for the limited proposition that equitable remands are not reviewable. But *Browning* also recognized and indeed *endorsed* the distinction between reviewability of remands on equitable grounds and reviewability of remands on other grounds, which had been drawn by the Third Circuit in *Pacor*:

> Nonreviewability extends only to the discretionary decision to remand or not to remand a properly removed action, not to whether the bankruptcy court originally had jurisdiction over the matter. . . . There is no dispute in the instant case that the Bankruptcy Court had jurisdiction to act and the manner in which it acted is not subject to our review. In *Pacor* . . . the Third Circuit held that, § 1478(b) notwithstanding, it could review a remand order when the bankruptcy court [believed that it] lacked jurisdiction under § 1471(b) [now § 1334] because the removed proceeding was not "related to" bankruptcy. In contrast, the instant action involves a decision by the Bankruptcy Court,

> having jurisdiction and in the exercise of its discretion, to remand the 1979 case.

Browning, 743 F.2d at 1076-77 n.21.[8] Thus *Browning* approved the *Pacor* distinction (which was simply ignored by the court in *Boone Coal*) and properly determined only that it could not review an order of remand based on equitable considerations -- not the type of remand at issue here.

B. The Legislative Intent of § 1452 Is To Permit Appeal of Remands Entered on Other Than "Any Equitable Ground"

The *Hernandez* and *Sykes* interpretations are contrary to standard canons of statutory construction. If a statute has a "semantic crack," it may be the job of Congress to patch

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[8] The Fifth Circuit's cases on this issue have not evolved in a straight line. The first, *In re Compton*, 711 F.2d 626 (5th Cir. 1983), was a two-paragraph *per curiam* opinion in which "no litigant made and no judge considered the fancy argument advanced in this case," *Sykes*, 834 F.2d at 492. *In re Rayburn Enterprises, Inc.*, 781 F.2d 501 (5th Cir. 1986) followed *Compton* with little or no more analysis. *Browning* then took pains, in its footnote 21 analysis, to point out the explicit distinction between equitable and other remands in the statute, which distinction had been ignored in *Compton* and *Rayburn*.

For those pains, the *Browning* court was chastised by two judges of the later, *Sykes* panel, for "overrul[ing]" *Compton* -- notwithstanding that *Compton* never considered the argument because it was never made. *Sykes*, 834 F.2d at 492; *see also* 834 F.2d at 493 (Rubin, J., concurring: "I do not fully agree with the rationale" of Part C of *Sykes* (i.e., that part which discussed *Pacor, Compton, Rayburn,* and *Browning*)).

In any event, *Sykes* is apparently controlling in the Fifth Circuit -- or perhaps not, *see* note 9, *infra*.

it, but the job of the courts is to apply the statute as written, crack or no:

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

Connecticut Nat'l. Bank v. Germain, 503 U.S. 249, 253-54 (1992).[9] Moreover, the *absence* of statutory language is as telling as its presence; the plain meaning of a statute can be ascertained also from what is plainly *not* in it. *Casus omissus pro omisso habendus est.*

Thus, in *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 825 (1990), this Court declined to infer that federal court jurisdiction was exclusive over claims under Title VII of the Civil Rights Act of 1964 because there was no such limitation in the statute:

> Unlike a number of statutes in which Congress unequivocally stated that the jurisdiction of the federal courts is exclusive, Title VII contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction. The omission of any such provision

[9] Indeed, *Germain* "in all likelihood overrules" *Sykes, Compton,* and *Rayburn*, in the opinion of one bankruptcy court within the Fifth Circuit. *In re Biglari Import & Export, Inc.*, 142 B.R. 777, 783 n.11 (Bankr. W.D. Tex. 1992).

> is strong, and arguably sufficient, evidence that Congress had no such intent.

494 U.S. at 823 (footnote omitted). The analogy to this case is apt: both cases concern whether a limitation on jurisdiction can be read into a statute that is silent as to the limitation, and both cases present a contrast with other statutes that *do* contain the limitation.

Yellow Freight reached its conclusion even in the face of legislative history arguably impelling a contrary reading of congressional intent. 494 U.S. at 824-25. *A fortiori* that conclusion would be appropriate where the legislative history cannot be so read.

As the Fifth Circuit observed in *Browning*, the legislative history of § 1478 "offers no insight into its intended scope," 743 F.2d at 1076, and the same is true as to § 1452. This is, then, a situation like that addressed in *Toibb v. Radloff*, 501 U.S. 157 (1991): "[T]he scant history on this precise issue does not suggest a 'clearly expressed legislative inten[t] . . . contrary . . . ' to the plain language." 501 U.S. at 162 (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Given that circumstance, here as in *Toibb*, the plain language should be applied. *See also Dewsnup v. Timm*, 502 U.S. 410, 419-20 (1992) (where the language of the statute is unambiguous, "silence in the legislative history cannot be controlling").

Section II of this brief shows that the statutory distinction in § 1452 is sound and sensible. But the speculations of lawyers -- or of courts -- as to whether there are good policy reasons to bar appeal only of equitable remands, and not of other-than-equitable remands, should in

no event prevail over the plain language of the statute. "Whether Congress has wisely balanced the sometimes conflicting policies underlying [a statute] is not a question that [the courts are] authorized to decide." *Union Bank v. Wolas*, 502 U.S. 151, 162 (1991).

Thus, a court should not disregard the plain language of a statute because of, e.g., its view that "[a]ppellate review of remand orders . . . is necessarily inefficient," *Sykes*, 834 F.2d at 491, or by postulating each and every result of that language which the court deems unwanted. *Hernandez*, 942 F.2d at 1225. "The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Toibb v. Radloff*, 501 U.S. 157, 164 (1991), *quoted in Union Bank*, 502 U.S. at 158. As this Court stated in another, more dramatic context,

> The fact, if it be so, that the act as it is written opens the door to blackmailing operations upon a large scale, is no reason why the courts should refuse to enforce it according to its terms, if within the constitutional authority of Congress. Such considerations are more appropriately addressed to the legislative branch of the government, which alone had authority to enact and may if it sees fit amend the law.

Caminetti v. United States, 242 U.S. 470, 490-91 (1917).

Nor is it correct to presume, as the *Hernandez* court did, 942 F.2d at 1226, that Congress could not have meant "equitable" because there is no longer a law/equity distinction.

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Morissette v. United States, 342 U.S. 246, 263 (1952); *United States v. Shabani*, 115 S. Ct. 382, 384 (1994) (it is a settled principle of statutory construction that Congress intends, absent contrary indications, to adopt the common law definition of statutory terms).[10]

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[10] And interpreting "equitable" to mean something else (like "appropriate") because the law/equity distinction has been abolished might have other unforeseen implications and do other mischief as well, given the use of the term in other sections of the United States Code. *E.g.*, 11 U.S.C. § 510(c)(1) (court may subordinate all or part of an allowed claim, etc. "under principles of equitable subordination"). Moreover, the Bankruptcy Court is a court of equity, deriving broad powers from 11 U.S.C. § 105. *Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1498-99 (1995); *United States v. Energy Resources Co., Inc.*, 495 U.S. 545, 549, 551 (1990). Finally, when Congress wants to use the word "appropriate," it does so -- including in the Bankruptcy Code. Indeed, *Energy Resources* considered two provisions of Title 11 containing the word, 495 U.S. at 549, and held, on grounds pertinent to the issue here, that the absence of a explicit statutory limitation (in that case, on certain powers of the bankruptcy court) was persuasive evidence that no such limitation was intended.

Finally, to construe *this* statute -- either by ignoring its plain language or (as will now be discussed) by wrongly invoking the general removal statute -- to bar appeal of other-than equitable remands should be especially forbidden: it is a "well-established principle that a court will not construe a statute to restrict access to judicial review unless Congress manifests its intent to do so by 'clear and convincing evidence,'" *South Windsor Convalescent Home, Inc. v. Mathews*, 541 F.2d 910, 914 (2d Cir. 1976) (quoting *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974)). There is no such "clear and convincing evidence" to support the ruling here.

In short, it may well be possible to construct an argument that "appropriate" is a more sensible word than "equitable" in the context of § 1452(b), *Hernandez*, 942 F.2d at 1226 -- but Congress did not use the word "appropriate." It used the word "equitable," which (1) does not mean "untimely under the removal rules," (2) is not absurd in the context, and (3) thus should be applied.

II.

APPELLATE REVIEW OF THE REMAND ORDER IS NOT BARRED BY § 1447(d)

The second basis upon which the courts of appeals have analyzed whether procedural or jurisdictional remands of § 1452 removals are reviewable is by consideration of the applicability of 28 U.S.C. § 1447(d) to such remands and removals.[11]

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[11] The fact that § 1441 was cited in Things Remembered's notices of removal as among the statutory bases for removal does not mandate the (continued...)

A. The "General" Removal Scheme and the Bankruptcy Removal Scheme Cannot Be Engrafted Onto Each Other

Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984), held that the "general" removal scheme of 28 U.S.C. §§ 1441-1447 is inapplicable to removals effected pursuant to the specific and self-contained bankruptcy removal scheme of 28 U.S.C. § 1478 (now 28 U.S.C. § 1452 and Fed. R. Bankr. P. 9027). Congress could not have intended that the general bar of § 1447 apply to bankruptcy removals under § 1452, the court held, because such an application would create "incongruous results" and "needless conflict and inconsistencies." *Pacor*, 743 F.2d at 992.[12]

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[11](...continued)
application of the provisions of § 1447 or preclude Things Remembered from arguing that it is not applicable to this § 1452 removal. Things Remembered's invocation of federal question jurisdiction through 28 U.S.C. § 1331, and removal through § 1441, was, as recognized by the District Court below, a proper "act of caution," *see* note 2, *supra*, though ultimately unnecessarily duplicative of the precise source of jurisdiction (§ 1334) and of removal (§ 1452). This case can and should be considered, therefore, as one in which the District Court remanded only a § 1452 removal on an other-than-equitable ground.

[12] The *Pacor* holding was addressed by the Third Circuit in *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 838, 39 n.4 (3d Cir. 1991), *cert. denied sub nom. General Pub. Utils. Corp.*, 503 U.S. 906 (1992). Although *TMI Litigation* has been characterized as the Third Circuit's "second thoughts" on *Pacor*, *see Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223 (7th Cir. 1991), the cited passage of *TMI Litigation* in fact remains faithful to *Pacor*; it leaves *Pacor* undisturbed while recognizing that *United States v. Rice*, 327 U.S. 742 (1946) may prohibit review of remand orders when a removal is effected pursuant to a statute which *could* bear the overlay of the general removal scheme. *See infra*, at 28.

These inconsistencies between the two removal schemes are apparent: there are differing time limits for filing notices of removal; there are differing fora from which removal may be effected; and there are differing parties who can effect removal. In short, "an inexplicable hiatus would develop if the two [schemes] were engrafted onto each other, whereby some removed bankruptcy cases would be covered by the procedures of sections 1441-1447, while others would not." 743 F.2d at 992.

As an example, consider the situation of a § 1452 removal of an arguably "related to" single cause of action taken by a plaintiff from a proceeding pending in a non-state forum court within 90 days of an order for relief under the Bankruptcy Code.[13] Such a removal would be timely pursuant to Fed. R. Bankr. P. 9027, would be arguably substantively proper under the federal court's "related to" jurisdiction of § 1334, and would be taken from an appropriate forum by an appropriate party under § 1452. Suppose then that the Bankruptcy Court, being of the opinion that the "related to" jurisdictional nexus did not exist, issued an order of remand, which was affirmed on appeal to the District Court. If the removing party appeals this jurisdictional ruling to the Court of Appeals, how, then, would the removal scheme, and particularly the appealability bar, of §§ 1441-1447 be applied?

To begin with, § 1441 speaks of removal of "civil actions" by "defendants," which did not occur. Section 1446 permits a "defendant" to file a notice of removal in a time period measured by the defendant's receipt of an initial

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[13] As an example of a plaintiff's timely removal from a non-state forum court under § 1452, *see In re Adams*, 133 B.R. 191 (Bankr. W.D. Mich. 1991) (removal from a Tribal Court).

pleading setting forth the basis for removal, which likewise did not occur. Section 1447 requires the remand of a "case" when subject matter jurisdiction appears lacking, and further provides that an order remanding that case to the state court from which it was removed is not reviewable. In the posited hypothetical, no "case" would have been remanded, and the cause of action which was remanded would not have been returned to a state court. Section 1447, including its bar to reviewability, would not be applicable to this hypothetical removal.

It seems clear, therefore, that not all § 1452 removals and remands could be governed by the removal/remand scheme of §§ 1441-1447. That being so, should *some* § 1452 removals and remands -- those that may be fitted into the more general scheme -- be governed by it?

The cases which disregard or discount the incongruities identified in *Pacor* import into the § 1452 removal scheme the idea that § 1447(d) bars appeal of all other remand orders, so that, combined, the two statutes "cover the waterfront," and so create an absolute bar to appeal. *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1225 (7th Cir. 1991). Thus, in addition to its assessment that the appealability bar of § 1452(b) should itself be construed broadly enough to encompass remands made for any reason, the *Hernandez* court opined that § 1447(d) is applicable to remands of removals effected pursuant to § 1452. This is said to result from the observation that:

> § 1452 relies on other provisions in Chapter 89 [of Title 28], which specify the time and procedure for removal. All § 1452(a) does is describe a class of removable cases; it does not say or imply, for example, that

> removal may occur without the signed petition required by § 1446(a) or after the time specified by § 1446(b).

942 F.2d at 1225. This observation is inaccurate, because removals of the class of cases described by § 1452(a) are governed *not* by § 1446, but by Fed. R. Bankr. P. 9027. There are substantial differences between § 1446 and Rule 9027, particularly with regard to time periods for removal, so that in fact § 1452(a) *does* imply that the §§ 1441-1447 scheme is inapplicable.[14]

The *Hernandez* court was also of the belief that, without any statutory authority to remand § 1452 cases removed without jurisdiction, a removed case would need to be dismissed outright, and would then be refiled, removed, and dismissed, on a sort of procedural yo-yo that would insulate a defendant from legal process. 942 F.2d at 1225. But *Carnegie-Mellon University v. Cohill*, 484 U.S. 341 (1988), establishes that a district court may remand, rather than dismiss outright, claims over which it would not originally have jurisdiction, so that a removal defendant could not use this *Hernandez* tactic of insulation from process.[15]

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[14] For example, a potentially removable claim first served on a defendant on the day before a bankruptcy case is commenced could be subject to Rule 9027(a)(2)(A), allowing ninety days after the order for relief to remove; or, according to *Hernandez*, it could be subject to § 1446, allowing only thirty days. This situation, again, demonstrates the incongruity between the removal schemes identified in *Pacor* and, again, offers a reason why the schemes cannot be said to overlap.

[15] Moreover, a § 1452 removal must be "signed pursuant to Rule 9011," *see* Fed. R. Bankr. P. 9027. Given this requirement, it would seem less (continued...)

In *Sykes v. Texas Air Corp.*, 834 F.2d 488 (5th Cir. 1987), the Fifth Circuit took a slightly different policy tack. That court held, in a portion of its opinion joined by two judges, that although "the carefully reasoned opinion" of *Pacor* was "a plausible way to avoid inconsistencies that could result from the simultaneous application of the two removal [schemes]," 834 F.2d. at 491, *Pacor* was nevertheless flawed because it straightforwardly applied the statutory language without regard to what the *Sykes* court determined to be the underlying (if unarticulated) congressional policy. The *Sykes* court believed that *Pacor*'s reading of the separate congressional enactments gave "incentives for the district court to engage in strategic maneuvering" with respect to the scope of appeal. 834 F.2d at 492. Deeming such "incentives" unwise (without addressing their plausibility), and deeming there to be one too many already in § 1447(d) as a result of *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), the Fifth Circuit dismissed the idea that Congress intended to permit review of § 1452 jurisdictional remands but not § 1447 jurisdictional remands.

But this Court has already determined that separate congressional enactments can operate one upon the other such that the more specific prevails over the more general. In *Federal Election Commission v. NRA Political Victory Fund*, 115 S. Ct. 537 (1994), this Court considered whether two statutes -- one granting the Federal Election Commission ("FEC") the authority to "appeal" actions under the Federal Election Campaign Act ("FECA") *and*

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[15](...continued)
than likely that a removing party would return to a court that had told that party, a relative moment before, that the original removal was improper.

under Title 26 of the United States Code, and one granting the FEC the authority to "petition the Supreme Court for certiorari" in actions under Title 26 only -- could be read to grant to the FEC the authority to petition for certiorari in FECA actions. Finding that authority to "appeal" *would* ordinarily include authority to petition for certiorari, the Court nevertheless held that the more specific statute must control:

> It is difficult, if not impossible, to place these sections alongside one another without concluding that Congress intended to restrict the FEC's independent litigating authority in this Court to actions enforcing Title 26 [only].

115 S. Ct. at 541. Likewise in this case, the specific scheme of § 1452 and Rule 9027 covers bankruptcy removals to the exclusion of the more general scheme of §§ 1441-1447. Here, too, it "is difficult, if not impossible, to place these [schemes] alongside one another without concluding that Congress intended to restrict" appeals only of equitable, and not other remands in removals effected under § 1452.

There are, furthermore, valid policy reasons why Congress may have intended to allow jurisdictional review under § 1452, but not under § 1447. The bankruptcy jurisdiction of the federal courts extends to all civil proceedings arising under, arising in, or related to cases under Title 11 of the United States Code. 28 U.S.C. § 1334. "Congress did not delineate the scope of 'related to' jurisdiction . . .," *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995), choosing instead to leave to the courts the task of defining its breadth. That undefined jurisdictional

scope stands in stark contrast to the exactitude with which other grants of jurisdiction may be determined upon removal under § 1441: parties are or are not diverse, and a sum in controversy does or does not exceed a statutory minimum; a well-pleaded complaint does or does not invoke a federal question. Cases removed in the absence of these factually verifiable bases of jurisdiction, and therefore remanded, do not, in the judgment of Congress, require appellate review of those facts (or the absence thereof).

But the federal courts' "related to" jurisdiction is far more uncertain and unverifiable: it concerns an analysis of whether "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Celotex*, 115 S. Ct. at 1499 n.6, (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). Particularly in light of the restrictions imposed on the functions of bankruptcy administration by *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), Congress may very well have chosen -- by remaining silent in § 1452 and declining to amend § 1447 -- to permit appellate courts to define the scope of "related to" jurisdiction.

B. *Thermtron* and *United States v. Rice* Support Petitioner's Reading of the Relationship Between § 1447 and § 1452

An examination of 28 U.S.C. § 1447 itself, as it has been interpreted by this Court, also leads to the conclusion that it does not, and was not intended to, govern removals effected under § 1452. Section 1447(d) is part of a section of Title 28 encompassing §§ 1441-1447 captioned "Actions Removable Generally" and "Procedures After Removal Generally." Subsection (d) provides, in pertinent part, that:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise [with an exception not relevant here].

Broad as this language may be, its bar to reviewability is not all-encompassing. In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), this Court held that only those orders remanding cases for a reason specified in subsection (c) of the statute would be subject to the review bar of subsection (d). *Thermtron* thus limited the potential reach of subsection (d) by requiring that it be read *in pari materia* with subsection (c).

By doing so, *Thermtron* also requires that the review bar of subsection (d) apply to only those cases removed by notice of removal under 28 U.S.C. § 1446(a) -- that is so because a § 1446(a) notice of removal is the only type of removal referred to in § 1447(c) (which must be read *in pari materia* with § 1447(d)). In other words, the language of § 1447(d), read *in pari materia* with § 1447(c) (as compelled by *Thermtron*), reads as follows:

> An order remanding a case [for lack of subject matter jurisdiction] to the State court from which it was removed [by filing of a notice of removal pursuant to § 1446(a)] is not reviewable on appeal or otherwise.

Therefore, a § 1452 removal, effected by a notice of removal filed in accordance with and under the time limits of Rule 9027, is not covered under and should not be

"imported" into § 1447(d), and § 1447(d) is hence inapplicable to bankruptcy removals.[16]

Even if one portion of § 1447(c) (that specifying the § 1446(a) notice of removal) were not *in pari materia* with § 1447(d), while another portion of § 1447(c) -- (that specifying the unreviewable remand must be on jurisdictional grounds) was *in pari materia*, a § 1452 jurisdictional remand would yet not necessarily be subject to the review bar of § 1447(d). Although this Court had, prior to *Thermtron*, applied the § 1447(d) review bar to a removal and remand effected under statutory authority other than § 1441 (that is, by a notice of removal other than the one defined in § 1446(a)) that decision is distinguishable from the circumstances of the instant case.

The most commonly cited source (including in the Sixth Circuit's Order below) for the broad, cross-statutory reach of § 1447(d) is *United States v. Rice*, 327 U.S. 742 (1946).[17] In *Rice*, the district court remanded, on juris

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[16] If *Thermtron* had held that § 1447(d) "means what it says," without the exception read in by the *Thermtron* majority, *see* 423 U.S. at 354 (Rehnquist, J., dissenting), there would be very simple grounds on which to reverse the decision of the Sixth Circuit below. If § 1447(d) barred all review of any remand order entered on any ground, that all encompassing prohibition would render § 1452(b)'s limited appeal bar superfluous, and thus would create a "positive repugnancy" between the separate appellate bars of §§ 1447(d) and 1452(b). *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992). *Germain* holds that where a positive repugnancy exists, such as to render one statute superfluous, the more specific congressional pronouncement (in this case § 1452) is to be given effect, and the more general (in this case § 1447) is not applicable.

[17] *Rice* has been legislatively overruled. *See* Act of Aug. 4, 1947, ch. 458, 3(c), 61 Stat. 732 (referenced in the notes following 25 U.S.C.

(continued...)

dictional grounds, a case removed pursuant to the Act of 1926, which permitted the United States to remove certain suits "in the State Courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma [is a party]." 327 U.S. at 744-45. Upon the United States' application to the Tenth Circuit for writ of mandamus, that court certified to this Court the question of whether such a remand was reviewable.

This Court first noted that (unlike § 1452) the Act of 1926 itself contained "no provisions respecting remand or any mode of review of an order of remand." 327 U.S. at 748. In the absence of such provision, this Court held, the Act of 1926 had to be read in conjunction with the general removal/remand scheme, first appearing in § 2 of the Judiciary Act of 1887 (and now appearing in 28 U.S.C. §§ 1441-1447), and that review of the remand was therefore barred.

Rice is distinguishable from the instant case, first, because "[n]othing in the Act of 1926 purport[ed] to impair or restrict the application of" the general removal bar. In § 1452, by contrast, Congress has set forth a remand/removal scheme which prohibits review of some, but not all, remand orders. Second, the application of the general removal/remand scheme to the Act of 1926 could create no incongruities or statutory gaps because the only forum from which removal could be effected under that Act -- the State Courts of Oklahoma - was included in the fora (any state court) to which the general scheme applied.

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[17](...continued)
§ 355) (granting the United States the right to appeal remand orders entered in cases involving property of Indians of the Five Civilized Tribes in Oklahoma).

Again in contrast, § 1452 does contemplate removals from non-state court fora -- which are *not* addressed in § 1447.

The issue before this Court involves whether removals and remands effected pursuant to § 1452 are subject to the appealability bar of § 1447(d) as interpreted in *Thermtron*. *Rice* shows that that general bar could perhaps be applied to removal statutes which can comfortably bear its overlay. Neither *Thermtron*, nor *Rice*, nor any other precedent to date, however, has explained or can explain the application of § 1447(d)'s narrow reviewability bar to a statute that (1) contains its own provisions for removal and remand, (2) contains its own reviewability bar (for equitable remands only), and (3) concerns a jurisdictional grant ("related to") of uncertain definition. Section 1452 is such a statute; it cannot, and does not accommodate § 1447.

CONCLUSION

The Sixth Circuit erred in dismissing this appeal, because there is no statutory bar to review of the District Court's Order. For the reasons set forth in this brief, Petitioner requests that this Court reverse the Sixth Circuit's Order, and remand this case to that court for consideration of the merits.

Respectfully submitted,

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APPENDIX

28 U.S.C. § 1334. Bankruptcy cases and proceedings*

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such

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* Section 1334 was amended October 22, 1994. Pub. L. No. 103-394, § 104(b), 1008 Stat. 4109 (1994). However, the amendments apply only to actions commenced under Title 11 on or after October 22, 1994, Pub. L. No. 103-294, § 702, 108 Stat. 4109 (1994), and so are not included here.

proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

* * * *

28 U.S.C. § 1446. Procedure for removal*

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction

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* Section 1446 was amended December 8, 1994. Pub. L. No. 103-465, § 321(b), 108 Stat. 4946 (1994). The changes effected by these amendments are not pertinent to the issues presented here and so are omitted.

conferred by section 1332 of this title more than 1 year after commencement of the action.

* * * *

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

* * * *

28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

28 U.S.C. § 1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

28 U.S.C. § 1478. Removal to the bankruptcy courts.

(a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a Government unit to enforce such governmental unit's police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise.

Fed. R. Bankr. P. 9027. Removal

(a) Notice of removal

(1) *Where Filed; Form and Content.* A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action the proceeding is core or non-core, and, if non-core, that the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy judge, and be accompanied by a copy of all process and pleadings.

(2) *Time for Filing; Civil Action Initiated Before Commencement of the Case Under the Code.* If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the ~~claim or~~ cause of action in a civil action has been stayed under § 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.

(3) *Time for Filing; Civil Action Initiated After Commencement of the Case Under the Code.* If a case under the Code is pending when a claim or cause of action is asserted in another court, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the

initial pleading setting forth the claim or cause of action sought to be removed or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

(b) Notice Promptly after filing the notice of removal, the party filing the notice shall serve a copy of it on all parties to the removed claim or cause of action.

(c) Filing in non-bankruptcy court Promptly after filing the notice of removal, the party filing the notice shall file a copy of it with the clerk of the court from which the claim or cause of action is removed. Removal of the claim or cause of action is effected on such filing of a copy of the notice of removal. The parties shall proceed no further in that court unless and until the claim or cause of action is remanded.

(d) Remand A motion for remand of the removed claim or cause of action shall be governed by Rule 9014 and served on the parties to the removed claim or cause of action.

(e) Procedure After Removal

(1) After removal of a claim or cause of action to a district court the district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the court from which the claim or cause of action was removed or otherwise.

(2) The district court or, if the case under the Code has been referred to a bankruptcy judge of the district,

the bankruptcy judge, may require the party filing the notice of removal to file with the clerk copies of all records and proceedings relating to the claim or cause of action in the court from which the claim or cause of action was removed.

(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 10 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.

(f) **Process after removal** If one or more of the defendants has not been served with process, the service has not been perfected prior to removal, or the process served proves to be defective, such process or service may be completed or new process issued pursuant to Part VII of these rules. This subdivision shall not deprive any defendant on whom process is served after removal of the defendant's right to move to remand the case.

(g) **Applicability of Part VII** The rules of Part VII apply to a claim or cause of action removed to a district court from a federal or state court and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the

other defenses or objections available under the rules of Part VII within 20 days following the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, or within 20 days following the service of summons on such initial pleading, or within five days following the filing of the notice of removal, whichever period is longest.

* * * *

Supreme Court, U.S.
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No. 94-1530

In The

Supreme Court of the United States

October Term, 1994

THINGS REMEMBERED, INC.,

Petitioner,

v.

ANTHONY A. PETRARCA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether an Order of a District Court remanding on jurisdictional grounds under 28 U.S.C. § 1447(d) a case which had been removed under 28 U.S.C. §§ 1446 and 1452 is reviewable by the Court of Appeals.[1,2]

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[1]Plaintiff–Respondent Petrarca has restated the Question Presented for Review based upon Petrarca's position, as set forth in greater detail infra, that by not appealing from the Bankruptcy Court's holding that the "bankruptcy removal" was not timely, Petitioner has waived its right to seek further review of that issue even if the District Court remand Order is appealable. Further, it is Petrarca's position that given the statutory language of §§ 1447 and 1452, this case was clearly remanded on jurisdictional grounds under § 1447 and not under § 1452 as Petitioner contends.

[2]This Court must also determine whether Petitioner properly preserved its right to make this appeal and whether Petitioner has waived its right to make this appeal by prosecuting in the state courts the issues which Petitioner contends must be litigated in the federal system.

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No. 94-1530

In The

Supreme Court of the United States

October Term, 1994

THINGS REMEMBERED, INC.,

Petitioner,

v.

ANTHONY A. PETRARCA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

JURISDICTION

Despite the Court's grant of the Petition for Writ of Certiorari, Respondent respectfully submits that this Court should find, in deciding the case on the merits, that neither the Sixth Circuit nor this Court has jurisdiction

to review the District Court Order pursuant to 28 U.S.C. § 1452(b), 28 U.S.C. § 1447(d) and this Court's previous decisions in *Volvo of America Corp. v. Schwarzer*, 429 U.S. 1331 (1976), and *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

STATEMENT OF THE CASE

Plaintiff-Respondent Anthony A. Petrarca (hereinafter "Petrarca") commenced this action by filing his Complaint in the Summit County, Ohio Court of Common Pleas on March 18, 1992. Petrarca's Complaint named Child World, Inc. (hereinafter "Child World") and Cole National Corporation (hereinafter "Cole") as Defendants.[3] Petrarca's Complaint sets forth four counts. The first count

[3]Things Remembered, Inc. (hereinafter "TRI") purported to enter into the Summit County action "as a successor by merger to Defendant Cole National Corporation" and has asserted in all Courts since that time that TRI "is successor in interest by merger to Cole National Corporation." *See e.g.* Petitioner's Brief at 3, n.1.

is a claim for money damages against Child World as lessee and Cole as guarantor based upon Child World's breach of a lease between Petrarca and Child World in Denver, Colorado. The second count is a claim against Child World as lessee and Cole as guarantor for future rents pursuant to that Denver lease. The third and fourth counts assert claims against Child World only and are not involved in this appeal.

On May 6, 1992, Child World filed its petition pursuant to Chapter 11 of Title 11, United States Code, in the United States Bankruptcy Court for the Southern District of New York, Case No. 92B20887.

On May 11, 1992, Child World filed in the Summit County action a suggestion of stay. On May 22, 1992, the Court entered an Order transferring the case to the inactive docket as to Child World only.

TRI filed an Answer on May 28, 1992. TRI did not assert in its Answer that the case should properly be in Federal Court. Next, TRI noticed and took two

depositions, one of a non-party witness and one of Plaintiff Petrarca.

On June 26, 1992, TRI filed its Amended Answer and Counterclaims. TRI asserted Counterclaims against Petrarca and also joined an additional Counterclaim Defendant Colfax Manor Gardens ("Colfax"), previously not a party to the action, and asserted purely permissive Counterclaims against Colfax. TRI asserted in its Counterclaim four counts for declaratory judgment raising issues virtually identical to those raised by Petrarca's original Complaint but relating to four additional leases between Petrarca and Child World and Cole guaranties of those leases. Obviously, TRI did not allege in its Amended Answer and Counterclaims that this action could only be litigated in Federal Court.

The parties proceeded with discovery until on August 28, 1992, Petrarca filed his First Amended Complaint bringing five more guaranty claims against TRI and Cole raising identical issues previously raised by Petrarca's original Complaint and by TRI's Counterclaim. Two of the properties which are the subject of

Petrarca's First Amended Complaint had previously been placed in issue by TRI's Counterclaim.

On September 15, 1992, TRI filed in the Court of Common Pleas, Cuyahoga County, Ohio a separate Complaint for declaratory relief against Petrarca and other Defendants seeking declaratory judgment upon two additional Cole guaranties of Child World leases raising issues similar to, although not identical to, the issues raised in this litigation but as to still more properties (hereinafter *"TRI vs. BGTV"*). Again, obviously, TRI did not allege in *TRI v. BGTV* that those claims could only be litigated in Federal Court.

On or about September 25, 1992, TRI filed its untimely Notice of Removed Action in the Court of Common Pleas, Summit County, Ohio, indicating that the case had been removed to the United States District Court, Northern District of Ohio and indicating further that the case had been removed **only pursuant to 28 U.S.C. § 1446(d)**. On or about the same day, TRI filed in the United States District Court for the Northern District

of Ohio and in the United States Bankruptcy Court for the Northern District of Ohio two separate and untimely Notices of Removal indicating that the case had been removed pursuant to 28 U.S.C. §§ 1331, 1334(b), 1441, 1446, 1452 and Bankruptcy Rule 9027. Petrarca filed in the District Court and in the Bankruptcy Court virtually identical Motions to Remand and Motions for Costs.

TRI filed both in the District Court and in the Bankruptcy Court Memoranda in Opposition to Petrarca's Motions to Remand. TRI then filed only in the Bankruptcy Court a Motion to Transfer Venue and a Memorandum in Support requesting the Bankruptcy Court to transfer venue of this case to the United States Bankruptcy Court for the Southern District of New York. Petrarca filed a Brief in Opposition and TRI filed a Reply Memorandum.

On June 25, 1993, the Bankruptcy Court entered its Memorandum of Decision on Motion to Remand and Motion to Transfer Venue. The Court found and held that TRI's removal to the District Court

under the general removal statute, 28 U.S.C. § 1446, was proper; however, the Court also found and held "that the removal to [the bankruptcy] court was untimely." (J.A. 12a.)

Petrarca timely appealed to the United States District Court. **TRI did not appeal from any aspect of the Bankruptcy Court's Memorandum of Decision or the Court's Order.** Upon consideration of Petrarca's appeal, the District Court reversed. Relative to the federal question removal, the District Court held that the September 25, 1992, Notice of Removal "was plainly without the thirty-day period for removal provided by § 1446(b)." (J.A. 27a.) The District Court then went on to affirm the Bankruptcy Court's holding that TRI had failed to timely remove the case under the bankruptcy removal provisions of 28 U.S.C. § 1452 and Bankruptcy Rule 9027. In so doing, the District Court reversed the Order of the Bankruptcy Court only insofar as the Bankruptcy Court had held that TRI's removal under the general removal statute was proper. The District Court remanded the case to the Bankruptcy

Court for further proceedings consistent with the District Court Order.

TRI appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit ordered TRI to show cause why the appeal should not be dismissed since, "[a]s a general rule, an order remanding an action to a state court from which is (sic) was removed is not reviewable on appeal or otherwise. 28 U.S.C. §§ 1447(d) and 1452(b); * * * [Citations omitted.] * * * It does not appear, therefore, that the order of the district court is an appealable order." (J.A. 34a.)

The parties briefed the show cause Order, and the Sixth Circuit then dismissed the appeal. The Sixth Circuit held: "The record clearly demonstrates that defendant sought removal pursuant to the general removal statute and that the district court held that the notice of removal was not filed within the time required by 28 U.S.C. § 1446(b). Thus, section 1447(d) prohibits review of that ruling. [Citations omitted.]" (J.A. 36a.) Relative to the bankruptcy removal, the Sixth Circuit held: "In

addition, the district court held that the notice of removal pursuant to § 1452 was not timely filed. Appellate review of that ruling is likewise barred. [Citations omitted.]" (J.A. 36a.)

TRI then petitioned the Sixth Circuit for rehearing and rehearing en banc. In response, on January 12, 1995, the Sixth Circuit entered an Order concluding "that the issues raised in the petition were fully considered upon the original submission and decision of the case." (J.A. 38a.)

On January 20, 1995, TRI filed as Plaintiff in state court in Denver, Colorado, a declaratory judgment action seeking a declaration by the Colorado state court of the rights and liabilities of TRI, Petrarca, and three other party defendants relative to the very same Denver Child World guaranty which was the subject of Petrarca's original Complaint but which TRI argues must be litigated in the federal court system.

On March 10, 1995, TRI filed its Petition for a Writ of Certiorari in this Court.

On March 15, 1995, TRI filed as Plaintiff in state court in Lancaster, Pennsylvania, an Action for Declaratory Judgment seeking a declaration by the Pennsylvania state court of the rights and liabilities of TRI, Petrarca, and three other party defendants relative to a Cole guaranty of Child World's obligations under a lease of a Child World store in Manheim Township, Pennsylvania. That Manheim Child World guaranty had been first placed in issue **in the Summit County, Ohio litigation, the case now pending before this Court, by TRI** in the Second Claim of its Counterclaim filed June 26, 1992. Petrarca also placed the Manheim Child World guaranty in issue in Counts Seven and Eight of his First Amended Complaint filed August 28, 1992. These two counts were included in TRI's improper removals. As with the Denver guaranty, TRI argues to this Court that the Manheim guaranty must be litigated in Federal Court, while at the same time TRI has commenced and is pursuing a declaratory judgment action on that guaranty in state court in Pennsylvania.

SUMMARY OF THE ARGUMENT

Appellate review of remand Orders is barred by 28 U.S.C. § 1452(b). Petitioner's semantic argument is contrary to Congress's intention to restrict judicial review of remand Orders and also creates an anomaly in and of itself. Accepting Petitioner's literal reading of § 1452 requires an interpretation of that statute which does not permit remands on the basis of lack of jurisdiction.

Assuming arguendo that there is a split in the circuits, Congress's intention to restrict judicial review of remand orders is supported by the majority of courts which have addressed the question. In fact, there is even authority out of at least one of the circuits which Petitioner contends supports its argument that remand Orders of bankruptcy removals are not reviewable.

Alternatively, since, under Petitioner's literal reading of § 1452, this case could not have been remanded under § 1452, the proper focus for

reviewability of the remand Order is in fact under 28 U.S.C. § 1447. Section 1447 unequivocally bars all appeals where cases are remanded based upon a lack of jurisdiction. In fact, this Court has already held that it has no authority to hear an appeal of a remand Order.

Finally, this Court should also find and hold that Petitioner did not preserve its right to make this appeal since Petitioner failed to appeal the Bankruptcy Court Order holding that Petitioner's bankruptcy remand was not timely. Additionally, Petitioner has waived its right to make this appeal by commencing and prosecuting in state courts litigation on the very same issues it contends must be litigated in the federal system.

ARGUMENT

I.

APPELLATE REVIEW OF REMAND ORDERS IS BARRED BY 28 U.S.C. § 1452(b).

Title 28 U.S.C. § 1452(b) provides:

> The court to which such claim or cause of action is removed may remand *such claim or cause of action on any equitable ground.* An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, *is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291 or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.* (Emphasis added.)

Subsection 1452(b) only permits a court to remand a claim on an equitable ground, whatever "on any equitable ground" means in the context of that statute. Petitioner does not tell this Court, or even attempt to tell this Court, what "on any equitable ground" means or what Petitioner thinks it means or should mean, but rather, Petitioner simply argues that the interpretations which have been presented by various circuit courts of appeals are clearly incorrect, and "jurisdiction" cannot be "any equitable ground." As discussed below, Congress intended to include "jurisdiction" within the phrase "on any equitable ground." The legislative

history is clear and convincing evidence of Congress's intention to restrict judicial review of remand Orders. Further, Petitioner only desires to literally interpret the second sentence of subsection 1452(b) and completely and totally ignores the first sentence of that subsection. Accepting Petitioner's literal reading of the second sentence of § 1452(b) not only contradicts Congress's intention, but also requires this Court to find that this case was not remanded "on any equitable ground" and therefore is without the provisions of § 1452(b). Therefore, the issue of appealability of the remand Order must be examined under 28 U.S.C. § 1447(d).

A. Congress intended to include "jurisdiction" within the phrase "on any equitable ground."

The phrase "equitable ground" was incorporated into the 1978 Bankruptcy Reform Act. However, the 1978 amendments did not discuss the intended meaning of the phrase "equitable ground." Before 1978 there was a dichotomy of

jurisdiction between the bankruptcy courts and the district courts which the 1978 Bankruptcy Reform Act terminated. S. Rep. No. 989, 95th Cong., 2d Sess. 17 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5803. In 1978, Congress broadened the jurisdiction held by bankruptcy courts to avoid serious delays, expense, and duplications that would occur by dividing claims in one cause of action or completely changing forums. H.R. Rep. No. 595, 95th Cong., 2d Sess. 51 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 6012. The House Report stated that the bankruptcy courts were to serve two goals: (1) be a fair and credible forum; (2) be efficiently and quickly operated. H.R. Rep. No. 595, 95th Cong., 2d Sess. 13 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5974. In order to accomplish these goals, Congress decided that

> * * * except where the bankruptcy court abstains from hearing an action or proceeding arising under or related to a case under title 11, all cases under title 11 and all civil actions and proceedings arising under or related to cases under title 11 are to be before the

> bankruptcy judge. S. Rep. No. 989, 95th Cong., 2d Sess. 18 (1978), reprinted at 5804.

Congress broadened the jurisdiction of the bankruptcy courts but this amendment, as noted, did not directly address or define the meaning of "equitable ground."

In the case of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) this Court concluded that the 1978 Act conferring broad subject-matter jurisdiction upon the bankruptcy courts was unconstitutional. S. Rep. No. 55, 98th Cong., 1st Sess. 8 (1983). The bankruptcy courts were intended to be adjuncts to the district courts, but, after 1978, they became more than adjuncts by adjudicating questions of constitutional law and even state law. S. Rep. No. 55.

Congress developed the Bankruptcy Amendments and Federal Judgeship Act of 1984 in response to *Marathon*. The Act of 1984 stipulated that bankruptcy courts would still handle most cases brought before them unless, as in this case, the

cause of action was grounded in state law and the parties did not consent to jurisdiction, or the district court elected to take the suit. 130 Cong. Rec. S 6084 (May 21, 1984) (statement by Sen. Doyle). Congress repeatedly cited to the concepts of equity and fairness by stating:

> If a party to a suit has a wholly State law claim which he wishes to have decided before his local state court, what **principles of equity** dictate that he should be subject to the jurisdiction of a distant Federal court simply because the other party has filed bankruptcy? *Id.*, at S. 6089. (Emphasis added.)

Furthermore, the debates surrounding the 1984 Act centered mostly on the fear of abuse of bankruptcy power. Congress feared that a party would not only use bankruptcy laws to escape state court jurisdiction and deny claimants a right to a fair trial in the appropriate court, **but Congress also feared that, as in this case, parties would litigate the jurisdictional question in order to delay the suit and increase litigation**

expenses. 130 Cong. Rec. S. 7619 (June 19, 1984) (statement by Sen. Heflin).

In fact, the Congressional intent in enacting the 1984 Act was expressly to preserve a litigant's right to have state law issues tried in the appropriate state forum and to avoid the use, as in this case, of "the bankruptcy laws solely to escape state court jurisdiction and deny claimants a right to a fair trial in the appropriate court." *Id.* Congress recognized that, as in this case, "[t]his is an abuse of the bankruptcy power." *Id.* Thus, in the 1984 Act, Congress clarified its intent to include "jurisdiction" as an "equitable ground," and limited the appeals process to the district courts.

The 1990 Judicial Improvements Act adopted many recommendations made by the Federal Courts Study Committee one of which was a clarification of the second sentence of 28 U.S.C. § 1452(b). Both the 1978 and 1984 Acts stated that an Order by the bankruptcy court to remand or not to remand was not reviewable by appeal or otherwise. The Federal Courts

Study Committee recommended that Congress amend 28 U.S.C. §1452(b)

> **'to clarify that they forbid only appeals from the district courts to the court of appeals, not from bankruptcy courts to the district courts.'** Staff of the Federal Courts Study Committee, 101st Cong., 2d Sess., Report of the Federal Courts Study Committee 77 (Comm. Print 1990) (Emphasis added).

This recommendation was obviously accepted. As one can see, Congress has continuously limited the appeals in which jurisdictional issues can be litigated.

Congress intended for jurisdiction to be an "equitable ground" in order to declare district court decisions to remand cases unreviewable by the court of appeals. This is evident by the strenuous debates concerning the unfairness of "jurisdiction by ambush," undue delay and expense, and the effects upon the estate in question of litigation in a different forum. H.R. Rep. No. 595 at 51.

B. Petitioner's literal reading of § 1452 contradicts Congress's intention.

Not only does Petitioner's proposed interpretation of § 1452 contradict Congress's intention to include "jurisdiction" within the phrase "on any equitable ground," but Petitioner's literal reading of section 1452 also presents an anomaly. Petitioner presents the issue as whether or not a remand Order under § 1452 is reviewable before petitioner answers the question of whether or not the case was in fact even remanded under § 1452. If Petitioner's argument is correct, that only Orders remanding cases "on any equitable ground" are not reviewable by appeal or otherwise, and if Petitioner is also correct that "jurisdiction" is not an "equitable ground" as that term is used in the statute, then it also must follow that cases may in fact only be remanded under § 1452(b) "on any equitable ground" and since this case was remanded on jurisdictional grounds, it could not have been remanded pursuant to § 1452(b).

Perhaps the best analysis of the flaw in Petitioner's reasoning appears in *Sykes v. Texas Air Corporation*, 834 F.2d 488 (5th Cir. 1987). As the Court in *Sykes* explained, the position espoused by Petitioner here would create more problems than it would resolve and would also undermine the Congressional policy behind the rule precluding appellate review of remand Orders. If this Court were to accept Petitioner's position, then months, or perhaps even years after a remand Order is entered, if a court of appeals decides that the remand was improper, the case would be

> * * * thrown into confusion and the effort expended by the parties on the state court proceeding (along with a good deal of state judicial resources) [would be] in jeopardy. And if the state case has proceeded to judgment, the subsequent re-removal is for naught as the parties are bound by res judicata. [Citations omitted.]

834 F.2d at 490.

The *Sykes* court also noticed that appellate review of remand Orders is necessarily inefficient since the remand

is either affirmed, thereby rendering the appeal itself a waste of time and judicial resources, or the remand is reversed, in which case any progress made in the state court proceeding is nullified. *Id.*, at 491. Additionally, the *Sykes* court noted the anomaly created by the holding in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3rd Cir. 1984), the case upon which Petitioner principally relies, which drew a distinction between bankruptcy removals and other removals. Under *Pacor*, in bankruptcy removals, only jurisdictional remands and not discretionary remands are reviewable. Under *Pacor*, in all other removals, only discretionary remands and not jurisdictional remands are reviewable. The *Sykes* court stated: "We cannot imagine that Congress actually intended such a perverse asymmetry, nor can we see how it furthers any conceivable congressional goal." *Id.*, at 491. This situation creates a very real possibility for manipulation. Under the theory presented by Petitioner here, a defendant could choose to direct which of two removal routes should be taken and

thereby control the possible grounds for remand and the type of appellate review, if any, that would be available. *Id.*, at 491-492.

Finally, the scope of review under the *Pacor* rule "turns on what the district court *says* it is doing." Where the district court "*says* it is remanding for lack of jurisdiction, the decision--even if flagrantly wrong--is completely unreviewable." However, where the district court *says* that its decision is based upon something other than lack of jurisdiction, then review of that order is available. *Id.*, at 492.

For all of these reasons, in addition to the fact that Congress intended to include "jurisdiction" within the phrase "any equitable ground," it is clear that appellate review of remand Orders is barred by 28 U.S.C. § 1452(b).

C. Petitioner never defines "on any equitable ground."

Although Petitioner argues that § 1452 only bars review of remand Orders "on any equitable ground," Petitioner

never defines or attempts to define the "equitable grounds" under which a case could be remanded thereby precluding appellate review. Petitioner merely states that this case was remanded on "jurisdictional grounds" and therefor was not remanded on "equitable grounds." Petitioner then argues, again without ever having defined "equitable grounds," that since this case was remanded on jurisdictional grounds, it is clearly not included in the language precluding appeal of remand orders under subsection 1452(b).

This Court need not construct an argument placing words into § 1452(b) which are not there as Petitioner contends in order to find that review of this remand Order is precluded by § 1452(b). As described above, Congress intended to include "jurisdiction" within the phrase "on any equitable ground." Again, the legislative history to this effect is clear and convincing and also indicates Congress's intention to restrict judicial review of remand Orders under § 1452(b).

D. Assuming arguendo there is a split in the circuits, Congress's intention has been manifested in decisions by the majority of courts holding that remands under § 1452(b) are not reviewable.

As set forth in Respondent's Brief in Opposition to the Petition for Writ of Certiorari, it is Respondent's position that there is not truly a split in the circuits since the cases upon which Petitioner relies can be distinguished on their facts or by the issues which were actually pending before the courts at the times of their decisions. Nevertheless, assuming for sake of argument that there is a split in the circuits, the majority of courts which have faced the issue have clearly manifested Congress's intention by their holdings that remands under § 1452(b) are not reviewable. Petitioner acknowledges that the Fifth, Sixth, and Seventh Circuits have all held that they do not have authority to hear appeals of remand Orders entered under 28 U.S.C. § 1452(b). See Petitioner's Brief at 11-13. Those cases are *Sykes, supra;*

Hernandez v. Brakegate, Ltd., 942 F.2d 1223 (7th Cir. 1991); and *Boone Coal and Timber Co. v. Polan*, 787 F.2d 1056 (6th Cir. 1986). *Sykes* has been discussed above. *Hernandez* also supports the Congressional intent discussed earlier in this section. The *Hernandez* court recognized the anomaly discussed earlier: "If § 1452(b) indeed identifies the only basis of remand, and if as *Pacor* held lack of subject-matter jurisdiction is not an 'equitable' ground, then there is no statutory authority to remand cases removed without jurisdiction. They would have to be dismissed outright." 942 F.2d 1223, at 1225 (7th Cir. 1991).

The Sixth Circuit in *Boone Coal* adopted the reasoning of the Fifth Circuit in *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984), and also echoed the Congressional intent to avoid delay in litigating the issue of propriety of remand orders when it stated: "The court noted that the purpose of making non-reviewable the bankruptcy court's remand order or its decision not to remand <u>was to avoid the delay that would result from litigating remand decisions</u> (citing 1

Collier on Bankruptcy § 3.01, at 3-80.1 - 3-81 (15th ed. 1984))." 787 F.2d 1056, at 1060 (emphasis added).

Only the Third Circuit in *Pacor* and the Eleventh Circuit in *In re National Developers, Inc.*, 803 F.2d 616, 619 (11th Cir. 1986), have drawn the distinction which Petitioner requests this Court to draw. Virtually every other court, whether a Bankruptcy Court, Federal District Court, or Circuit Court of Appeals, which has addressed this issue has refused to hold that orders remanding cases removed under 28 U.S.C. § 1452 are reviewable. *See, In re Adams*, 809 F.2d 1187 (5th Cir. 1987) (holding that court of appeals had no jurisdiction to review District Court's order remanding litigation under section 1452(b)) (This is the further history of the case which Petitioner cites as "[a]n example of a plaintiff's timely removal from a non-state forum court under § 1452." Petitioner's Br. at 20, n. 13); *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984) (Section 1478(b) provides that "[a]n order under this subsection remanding a claim or cause of action or a decision

not so remanding, is not reviewable by appeal or otherwise. * * * The statute plainly prohibits our review of a bankruptcy court's remand order on direct appeal."); *In re Compton*, 711 F.2d 626 (5th Cir. 1983) (action of Federal District Court remanding divorce case to state court after bankruptcy court had exerted removal jurisdiction was not appealable whether the remand was a matter of abstention or was for a perceived want of jurisdiction); *In re Rayburn Enterprises, Inc.*, 781 F.2d 501 (5th Cir. 1986) (appellate court lacked jurisdiction over appeal of district court order remanding to state court an action which had been removed to bankruptcy court regardless of whether the order was viewed as grounded in want of jurisdiction or based on abstention); *Dominick v. Dixie National Life Insurance*, 809 F.2d 1559 (11th Cir. 1987) (It is clear that by virtue of 28 U.S.C. § 1478(b) [the precursor of § 1452(b)] a decision not to remand is not reviewable on appeal.) (It should be noted that *Dominick* is from the same Circuit and later in time than *In re National*

Developers, Inc., one of the two cases upon which Petitioner places primary reliance for its position.); *In re Hanson Industries, Inc.*, 83 B.R. 659 (Bkrtcy. D. Minn. 1988) ("In all cases where the bankruptcy court entered the order of remand, the circuit courts found that the bankruptcy court's decision was appealable to the district court, but not appealable to the circuit court." [Citations omitted.] 83 B.R. 659, at 666-667.); *In re Branded Products, Inc.*, 154 B.R. 936 (Bkrtcy. W.D. Tex. 1993) (Where bankruptcy court lacks jurisdiction, case should be remanded immediately to state court. *Id.*, at 945. No appellate review is available from district court decision remanding case. *Id.*, at 946.); *In re Potts*, 724 F.2d 47 (6th Cir. 1984) (bankruptcy court's refusal to remand case to court from which it was removed was not reviewable).

In summary, appellate review of remand Orders, regardless of the basis, is barred by 28 U.S.C. § 1452(b). Congress intended to include "jurisdiction" within the phrase "on any equitable ground." This legislative

history is "clear and convincing evidence" of Congress's intention to restrict judicial review of all remand Orders, regardless of their context or their basis. Assuming arguendo there is a split amongst the circuits, the weight of authority amongst those Courts which have faced the issue holds that remands under § 1452(b), regardless of the grounds, are not reviewable. The analysis of the issue presented by these Courts is clearly the better reasoned approach. This Honorable Court should hold, consistent with Congress's intention, that remands under 28 U.S.C. § 1452(b), regardless of the basis, are not reviewable by Circuit Courts of Appeals or by this Court. Alternatively, this Court should find that this case was not remanded under § 1452 and move to the analysis presented in Part II of this Brief, that being whether appellate review of remand Orders is barred by 28 U.S.C. § 1447.

II.

APPELLATE REVIEW OF THIS REMAND ORDER IS BARRED BY 28 U.S.C. § 1447.

Again, this Court can and should find and hold that § 1452(b) bars appellate review of this remand Order. Alternatively, the Court should determine, under Petitioner's literal reading of *all parts* of § 1452(b), that this case was *not* remanded pursuant to § 1452(b). In that instance, the analysis shifts to § 1447(d). Also in that instance, this Court can and should find that section 1447(d) bars review of the District Court's Order of remand in this case.

A. Section 1447 bars appellate review when cases are remanded for want of jurisdiction

There is no question that § 1447(d) bars appellate review. It does not contain the language which Petitioner hangs its hat on in § 1452 to say that

jurisdictional remands are reviewable. Subsection 1447(d) provides:

> An order remanding a case to the State from which it was removed **is not reviewable on appeal or otherwise**, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise. (Emphasis added.)

The issue in the analysis of application of § 1447 is not whether that section permits review of remand Orders but whether that section can have application to cases removed under § 1452 or under §§ 1452 *and* 1447. The best analysis of the applicability of both sections to a single case appears in *Hernandez, supra*. In *Hernandez* the Seventh Circuit stated:

> Sections 1447 and 1452 belong to Chapter 89 of Title 28. Nothing in text or structure suggests that the general provisions of § 1447 are inapplicable to cases removed under § 1452, any more than they would fall away for removals under § 1442 (federal officers), § 1442(a) (members of armed forces) or other statutes authorizing removal. To

> the contrary, § 1452 relies on other provisions in Chapter 89, which specify the time and procedure for removal. All § 1452(a) does is describe a class of removable cases; it does not say or imply, for example, that removal may occur without the signed petition required by § 1446(a) or after the time specified by § 1446(b). If § 1452(b) indeed identifies the only basis of remand, and if as *Pacor* held lack of subject-matter jurisdiction is not an 'equitable' ground, then there is no statutory authority to remand cases removed without jurisdiction. They would have to be dismissed outright. If filed again in state court, they could be removed again, followed by dismissal. Defendants could immunize themselves from legal process, a most unlikely outcome of § 1452. The statute authorizing remand for want of jurisdiction is § 1447(c), and § 1447(d) bars review of such remands. Both the Supreme Court, *United States v. Rice*, 327 U.S. 742, 66 S.Ct. 835, 90 L.Ed. 982 (1946), and this Court, *Resolution Trust Corp. v. Lightfoot*, 938 F.2d 65 (7th Cir. 1991), have held that authorization to remove cases arising out of a particular subject does not imply inapplicability of the general provisions concerning removal. Section 1452 is not an exception to this rule.

942 F.2d 1223, at 1225.

Additionally, the Tenth Circuit recently held in *Daleske v. Fairfield Communities, Inc.*, 17 F.3d 321 (10th Cir. 1994), as follows:

> Moreover, the remand provision in section 1452(b) is limited to discretionary remands based on equitable grounds. If this were the only statute to apply, there would be no requirement that cases removed under section 1452(a) be remanded on the purely legal ground that the District Court lacks subject matter jurisdiction. Because § 1447(c) requires such a remand, the statutes cover different contingencies, and should both be given effect. For these reasons, the provisions of 28 U.S.C. § 1447(c) apply to cases removed under § 1452(a) as well.

17 F.3d 321, at 324.

Assuming that § 1447 does apply to bankruptcy removals as the Courts in *Hernandez* and *Daleske* have held, under this Court's own rulings in *Volvo of America Corp. v. Schwarzer*, 429 U.S. 1331 (1976) and *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), neither a Circuit Court of Appeals nor this Court has jurisdiction to review a District Court Order remanding an action

to state court on grounds permitted within the statute. *Volvo* is particularly significant here insofar as the District Court in *Volvo* found that it was without jurisdiction over the matter and that was the basis for the remand.

B. Removal under special removal provisions does not imply inapplicability of general removal statute provisions.

Finally, as described above, this Court has also held in *United States v. Rice*, 327 U.S. 742 (1946), that the mere authority to remove an action arising out of a particular subject matter does *not* imply the inapplicability of the general statutory provisions concerning removal to those types of cases. Although Petitioner argues that *Rice* was decided prior to enactment of the Bankruptcy Code, *Rice* has been reaffirmed by this Court and followed by various Circuit Courts on many occasions since enactment of the Bankruptcy Code. *See e.g. Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (in

the bankruptcy context); *Resolution Trust Corp. v. Lightfoot*, 938 F.2d 65 (7th Cir. 1991); *FSLIC v. Frumenti Development Corp.*, 857 F.2d 665 (9th Cir. 1988) (the FSLIC's special removal statute, 12 U.S.C. § 1730(k)(1), does not make § 1447(d) inapplicable); *In re FSLIC*, 881 F.2d 564 (8th Cir. 1989) (same); *Nasuti v. Scannell*, 792 F.2d 264 (1st Cir. 1986).

III.

PETITIONER DID NOT PRESERVE ITS RIGHT TO MAKE THIS APPEAL WHEN IT FAILED TO APPEAL THE BANKRUPTCY COURT ORDER AND WAIVED ITS RIGHT TO MAKE THIS APPEAL BY PROSECUTING STATE COURT LITIGATION ON ISSUES IT CONTENDS MUST BE LITIGATED IN THE FEDERAL SYSTEM.

This Court and other federal appellate courts have long recognized the proposition that this Court is without jurisdiction to consider an argument not raised in the court below. *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447 (1936); *United States v. Socony-*

Vacuum Oil Co., Inc., 310 U.S. 150 (1940); and *Michel v. Louisiana*, 350 U.S. 91 (1955).

In this case, it is clear from the record of each court in which this case has proceeded that TRI attempted to remove this action both under the general removal statute, 28 U.S.C. § 1446, and under the bankruptcy removal statute, 28 U.S.C. § 1452. In fact, the Notice of Removed Action filed in the Summit County Court of Common Pleas indicated that the case had been removed **only pursuant to 28 U.S.C. § 1446(d).**[4] The Bankruptcy Court held that TRI had failed to timely remove this case under the bankruptcy removal statute but that TRI had timely removed the case under the general removal statute. **TRI did not appeal any aspect of that ruling of the Bankruptcy Court.**

Because the bankruptcy judge ordered the case transferred to the United States Bankruptcy Court for the Southern District of New York, Petrarca did appeal

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[4]Arguably, the case was only properly removed under § 1446(d) and the § 1452 issue is not properly before this Court.

the Bankruptcy Court's holding that the case was properly removed under the general removal statute. Now, despite TRI's reliance upon the Bankruptcy Court's holding that it had properly removed the case under the general removal statute, and despite TRI's failure to appeal the Bankruptcy Court's holding that TRI had failed to properly remove the case under the bankruptcy removal statute, TRI desires to have this Court decide the question of whether or not an appeal of an Order remanding a case removed under § 1452 is barred where the remand Order is based on jurisdictional grounds. Since Petrarca appealed the Bankruptcy Court's holding that the case had been properly removed under the general removal provisions, the District Court's Order, in effect, only reversed that portion of the Bankruptcy Court Order and remanded the case under the provisions of 28 U.S.C. § 1447(d).

Section 1447(d) does not include the language which TRI asks this Court to examine and which is contained in § 1452. TRI's argument is misdirected since this case was not remanded under § 1452. TRI

failed to appeal the Bankruptcy Court's earlier holding that the bankruptcy removal was not timely. Therefore, TRI forfeited its right to appeal that question here.

TRI has also waived its right to argue that these issues as between Petrarca and TRI ought to, and can only, be litigated in Bankruptcy Court as a result of TRI's most recent conduct in commencing two separate state court actions seeking to litigate in state court the very same issues involved in this case.

In this regard, not only has TRI waived its right to assert that these issues ought to, and can only, be litigated in Bankruptcy Court, additionally, the question which TRI asks this Court to decide is now moot as a result of TRI's conduct in commencing state court actions in Ohio, Colorado, and Pennsylvania on these very same issues.

Federal Courts are prohibited from deciding moot questions. There must be an actual case or controversy between the parties at the time the issue is

reviewed. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937), *reh. den.* 300 U.S. 687 (1937); *North Carolina v. Rice*, 404 U.S. 244 (1971). "[M]oot questions require no answer." *Missouri, Kansas & Texas R. Co. v. Ferris*, 179 U.S. 602, 606 (1900). Further, this Court may refuse to consider unnecessary questions. *Mercer v. Theriot*, 377 U.S. 152 (1964), *reh. den.* 377 U.S. 973 (1964).

In this case, as a result of TRI's voluntary choice to pursue state court remedies on those issues it had previously argued must be litigated in Bankruptcy Court, the issues are moot and it is unnecessary for this Court to decide the issue presented by Petitioner TRI.

CONCLUSION

This Court should find, consistent with the Congressional intent to include "jurisdiction" within the phrase "on any equitable ground," and consistent with the Congressional intent to restrict judicial review of all remand Orders, that 28 U.S.C. § 1452(b) precludes appellate review of the District Court's Order remanding this case to state court either by the Sixth Circuit or by this Court.

In the alternative, this Court should find, accepting Petitioner's "literal" interpretation of § 1452, but literally interpreting all of § 1452 and not only that portion of the statute which Petitioner desires this Court to examine, that § 1452(b) permits remands of bankruptcy removals only "on any equitable ground." Hence, § 1452 does not apply to this action; rather, the District Court remand Order was based on § 1447(d) which unequivocally precludes review of the District Court remand Order either by the Sixth Circuit or by this Court.

This Court could also resolve this appeal by simply finding that Petitioner failed to properly preserve its right to make this appeal or that Petitioner has waived its right to make this appeal by commencing and prosecuting state court litigation in various state court forums on the very same issues which Petitioner contends must be litigated in the federal system.

Respectfully submitted,

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In compliance with Rule 29.5, all parties required to be served have been served.

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Supreme Court, U.S.
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No. 94-1530

In the Supreme Court of the United States

OCTOBER TERM, 1994

THINGS REMEMBERED, INC.,
Petitioner,

v.

ANTHONY A. PETRARCA,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether an order remanding a case on other than "any equitable ground," which case had been removed pursuant to 28 U.S.C. § 1452, is reviewable by the court of appeals.

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ON WRIT OF CERTIORARI TO
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FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Petitioner Things Remembered, Inc.[1] ("Things Remembered") submits that nothing in either the *Brief for Respondent* or the *Brief for Amicus* defeats the arguments set forth in Things Remembered's main brief. Why that is so, and why this Court should reverse the Sixth Circuit's order dismissing Things Remembered's appeal, is discussed in detail here in Things Remembered's Reply Brief, which proceeds generally in the same order of argument as its first brief.

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[1] Pursuant to Supreme Court Rule 29.1, Things Remembered respectfully refers the Court to the statement at *Brief for Petitioner* at 3 n.1.

ARGUMENT

I.

APPELLATE REVIEW OF THE REMAND ORDER IS NOT BARRED BY § 1452

Initially, Petrarca argues that Things Remembered has not defined "any equitable ground" and that "any equitable ground" includes "jurisdiction." The first point is correct, the second not: whatever the grounds were for the remand, they were not "equitable." Thus, the plain language of 28 U.S.C. § 1452(b) should be given effect to allow appellate review of the District Court's order.

A. The Remand Was Not Entered "On Any Equitable Ground"

Things Remembered need not catalogue every conceivable equitable[2] ground the District Court might have considered to show that its holding -- that event *X* followed deadline *Y* -- was decidedly not premised "on any equitable ground" within § 1452(b). The Bankruptcy Court and District Court Orders addressed only whether Things

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[2] If definition of "equitable" is needed, Things Remembered would suggest, and accept, any of these: "Just; conformable to the principles of justice and right. Existing in equity; available or sustainable in equity, or upon the rules and principles of equity." *Black's Law Dictionary*, 482 (5th ed. 1979); "characterized by equity: fair to all concerned: without prejudice, favor, or rigor entailing undue hardship. 2. that can be sustained or made effective in a court of equity or upon principles of equity jurisprudence: existing or valid in equity as distinguished from law. Syn see fair." *Webster's Third New International Dictionary*, 769 (1976).

Remembered's removals were timely, and explicitly declined to address motions and arguments raising other issues, (J.A. 9a, 31a). The District Court's analysis merely computed (from an erroneous starting point, Things Remembered would have argued, and hopes to argue, in the Sixth Circuit) the time for removal. This was in the nature of an arithmetical calculation.

It was not, in contrast, a discretionary judgment call that required weighing the relative merits of various considerations that might or might not favor remand. Those kinds of judgment calls do not permit a black-or-white, yes-or-no holding, but rather a wise and informed, *vel non*, decision, not susceptible to easy, or proper, review in a higher court. Timeliness, on the other hand, is quantifiable and rigid. Decisions on timeliness grounds are demonstrably right or wrong, and so can be and are reviewed de novo. This is precisely the distinction that Congress has galvanized, in 28 U.S.C. § 1452(b), by prohibiting review of remands on equitable grounds, but not others.

B. "Any Equitable Ground" Does Not Encompass "Any Ground" of Remand

Petrarca's argument for inclusion of "jurisdiction" in "any equitable ground" proceeds without logical support. Thus, even if it is correct to say that Congress intended generally that state law claims be tried in state court, even if Congressional debates "repeatedly cited to the concepts of equity and fairness," *Brief for Respondent* at 17, and even if statements by individual Senators can appropriately guide this Court's reading of the statute,[3] *id.* at 17-18, the bald

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[3] It may be that Petrarca's free and easy paraphrases of the legislative

(continued...)

conclusion that Petrarca draws -- that "Congress clarified its intent to include 'jurisdiction' as an 'equitable ground,'" *id.* at 18, just does not follow. At most, Petrarca's entire argument here is a simple assertion that Congress *ought to* have prohibited appeals of remands made on "jurisdictional" grounds in § 1452(b). But it did not, and the omission must have meant something; in any event it should not be judicially supplied.

Finally, Petrarca uses this section of his brief to lambaste Things Remembered for "litigat[ing] the jurisdictional question in order to delay the suit and increase litigation expenses," and other alleged misdeeds. *Brief for Respondent* at 17-18. (Though structured less as a direct attack on Things Remembered, Amicus makes a similar point -- that litigating over where to litigate is wasteful. Indeed, that is the whole point of the Amicus brief.[4])

The criticism is not justified or fair. The right to invoke federal bankruptcy jurisdiction proceeds from the

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[3](...continued)
history materials he cites, *Brief for Respondent* at 14-20, are accurate, but the statements are so general as to be all but meaningless here. One need not dispute, for example, that the "abuse of bankruptcy power," *id.* at 17, is a legitimate Congressional concern, in order to argue that the words of the statute here at issue should be applied.

[4] Part of the basis for the *Amicus* argument is the incorrect assertion that the Child World bankruptcy case "is now long since over." *Amicus Brief* at 6. It is not; that a plan was confirmed, *id.* n.17, does not end the bankruptcy case. In fact, the Child World Bankruptcy Court has explicitly retained jurisdiction over claims, including Petrarca's here, "initiated in or removed to the Bankruptcy Court involving real property leases rejected by Child World . . ." *See* Exhibit B to Brief for Appellee Things Remembered, Inc. (filed Aug. 31, 1993 in Case No. 5:93-CV-1582) at 7.

Constitution's recognition of bankruptcy as a unique federal concern, U.S. Const. art. I § 8 cl. 4, one in which all matters affecting the estate may be adjudicated in a single forum. The fact that Petrarca's claims may affect or be affected by the estate of a bankrupt under federal court protection is not the doing of Things Remembered; the fact that Congress allows those claims to be addressed in a single, fair, credible and efficient bankruptcy court forum is a policy choice Congress, not Things Remembered, has made.

Petrarca's criticism, moreover, has a little of the pot calling the kettle black about it. Had the lower Bankruptcy Court's order of transfer been given effect, this case might likely have been concluded by now. It was not given effect; Petrarca chose to appeal the bankruptcy court's order of transfer in the face of ample precedent supporting it. That appeal, too, was litigation over where to litigate, and Things Remembered's good faith in removing was surely no less than Petrarca's in appealing.

II

APPELLATE REVIEW OF THE REMAND ORDER IS NOT BARRED BY § 1447(d)

Section 1452 does not bar appeal of remands of bankruptcy removals based on timeliness grounds -- that is clear. Neither does § 1447(d).

A. The Remand Order Was Not Issued Pursuant to § 1447

Faced with the plain language of § 1452(b), Petrarca next advances the argument that "since this case was remanded on jurisdictional grounds, it could not have been remanded pursuant to § 1452(b)." *Brief for Respondent* at 20. Even were that true (which Things Remembered does not concede[5]) it does not follow that the remand must therefore have been made pursuant to 28 U.S.C. § 1447(d) and hence is subject to the appellate bar of *that* subsection.

Petrarca's argument in this regard is founded in *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223 (7th Cir. 1991). *Hernandez* erroneously presumed that federal courts have no power to remand cases unless such power is granted by statute, and that if statutory authorization for remand is lacking, a case must be dismissed outright. 942 F.2d at 1225. But this Court has held that remands can be made, validly and effectively, without explicit statutory authority. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 341 (1988). *See Brief for Petitioner* at 28. Here it is irrelevant whether there exists applicable statutory authorization to remand. Rather, the relevant point is that where there exists no applicable statutory bar to appeal, appeal is permitted.

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[5] One of Petrarca's own citations, *In re Branded Products, Inc.*, 154 B.R. 936, 945 (Bankr. W.D. Tex. 1993), *Brief for Respondent* at 29, suggests that the power to remand on a ground which is not "any equitable ground" derives from § 1452(a). That observation, if anything, supports Things Remembered's argument that the appellate bar of § 1452(b) applies solely to remands "entered under this subsection," i.e., those entered "on any equitable ground."

The significance of the foregoing is that the *Hernandez* court's characterization of the two statutory bars to appeal as "cover[ing] the waterfront," or Respondent's presentation of the issue as a dichotomy from which there is no escape, are wrong. The remand at issue in this case could be legally correct, whether or not authorized by either of § 1452 or § 1447, but subject to the appellate bar of neither. In that event, Things Remembered is entitled to an appellate court decision as to the legal correctness of the remand.[6]

Finally, Petrarca catalogs a number of cases which he contends are supportive of the application of some bar to appeal to the remand order issued in this case. *Brief for Respondent* at 25-31. Though a lower court scorecard is less than pertinent here, Things Remembered will briefly address those new cases Petrarca cites, all of which are distinguishable, that were not discussed in the Brief for Petitioner.

In re Adams, 809 F.2d 1187 (5th Cir. 1987) dismissed an appeal of an order of remand by virtue of both 28 U.S.C. §§ 1334(c)(2) and 1452(b). The ruling as to the former statute was correct because it does not carve out an exception for other-than-equitable remands. As to § 1452(b), *Adams* ignored the distinction between remands on equitable grounds and other remands.[7]

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[6] Petrarca also relies on *Sykes v. Texas Air Corp.*, 834 F.2d 488 (5th Cir. 1987) and the notion that appellate review of remand orders might jeopardize state court proceedings. *Brief for Respondent* at 21. If that is plausible elsewhere, it has no bearing here, where there was little activity in the state court before the removal and none after.

[7] Petrarca's puzzling parenthetical, *Brief for Respondent* at 27, (continued...)

Dominick v. Dixie National Life Insurance Co., 809 F.2d 1559 (11th Cir. 1987) and *In re Potts*, 724 F.2d 47 (6th Cir. 1984), involved reviewability of decisions to retain, not remand, removed cases. Those cases are readily explained by reference to the plain language of § 1452 (or its predecessor § 1478): "[a]n order under this subsection remanding a claim or cause of action, *or a decision to not remand*, is not reviewable by appeal . . ." (emphasis added). *In re Branded Products, Inc.*, 154 B.R. 936 (Bankr., W.D. Tex. 1993); and *In re Hansen Industries, Inc.*, 83 B.R. 659 (Bankr. D. Minn. 1988) are both bankruptcy court decisions which cannot be authoritative on this question of appealability.

Where a removed case could be heard in the bankruptcy court, but the bankruptcy court erroneously remands because it believes it does not have jurisdiction, or that the removal was untimely, or for any reason other than "any equitable" one, appellate review of that order is permitted because the language of § 1452 does not prohibit it.

B. The Bankruptcy Removal Scheme Contemplates and Permits Appeal of the Remand Order

Petrarca (and the Amicus) contend that appeal of *any* remand based on "jurisdictional" grounds is barred by

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[7](...continued)
describes *Adams* as "the further history of the case which Petitioner cites" at *Brief for Petitioner* at 20 n.13. *In re Adams*, 809 F.2d 1187 (5th Cir. 1987) and *In re Adams*, 133 B.R. 191 (Bankr. W.D. Mich. 1991) share the same name but are not the same case and have little or nothing to do with each other substantively.

§ 1447(d). The short answer to this contention is that this remand was not on jurisdictional grounds,[8] and the argument is therefore based on an inaccurate premise. This remand was instead ordered because of a perceived defect in timeliness of the removal.

It is true that § 1447(d) could bar appeal, in the general removal context, of remands based on procedural defects as well as those based on lack of jurisdiction. *See, e.g., Balazik v. County of Dauphin*, 44 F.3d 209 (3rd Cir. 1995). But it does not and cannot follow that appeal of an remand order grounded on a perceived defect in timeliness of a removal taken in the *bankruptcy* context is also barred by § 1447(d). The conclusion is evident from an analysis of the differing rules by which a removed party may seek remand; that analysis shows that Petrarca's suggestion would impose on the removing party the bar to appeal of § 1447(d), while releasing the removed party from the deadline of § 1447(c). That asymmetrical strategic advantage could not have been intended, and was not enacted, by Congress.

Under § 1447(c), "a motion to remand the case on the basis of any defect in removal procedure must be made within 30 days following the notice of removal under

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[8] The District Court held that the Bankruptcy Court "lacked jurisdiction," but it could not have meant *subject-matter* jurisdiction because failure to timely remove does not divest the court of jurisdiction. This case differs in that respect from three of the precedents on this issue, *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984); *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223 (7th Cir. 1991); and *Sykes v. Texas Air Corp.*, 834 F.2d 488 (5th Cir. 1987), all of which considered remands made for lack of subject-matter jurisdiction.

section 1446(a)."[9] Absent such a motion, the removed party is deemed to waive any objection to procedural defects and the case (if there is subject matter jurisdiction) will proceed to judgment. At that point, any procedural defect in removal will never be at issue; the District Court may not raise the defect sua sponte. *See Matter of Continental Casualty Co.*, 29 F.3d 292 (7th Cir. 1994); *In re Allstate Ins. Co.*, 8 F.3d 219 (5th Cir. 1993).

By contrast, a perceived defect in removal procedure is never deemed waived in a bankruptcy-context removal, for Rule 9027 does not impose any time limit on a motion to remand.[10] The Amicus acknowledges this difference, *see Amicus Brief* at 20, but overlooks its significance.

That significance lies in the fact that the removed party in a bankruptcy-context removal acquires a right to identify, and move on, a procedural defect at any time, notwithstanding the deadline of § 1447(c). If for whatever reason things appear to be going badly in federal court at some later time, the removed party could then present its procedural objections. At the same time (under Petrarca's

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[9] This language was added to § 1447(c) by Section 1016 of the Judicial Improvements and Access to Justice Act of 1988, Pub.L. 100-702, 102 Stat. 4642. The intent of the amendment was to deal with the "risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means of forum shopping if the litigation should take an unfavorable turn." H.R. Doc. No. 889, 100th Cong., 2d Sess. 7 (1988), 1988 U.S.C.C.A.N. 5982, 6033.

[10] It would not appear that Rule 9027(d) imports the time limitation of § 1447(c), for § 1447(c), by its explicit terms, measures the motion deadline from "the filing of the notice of removal under Section § 1446(a)." That section contains procedures and time limitations which vary in some respects from the notice of removal described in Rule 9027(a). *See infra* this Reply Brief at n.12.

theory) the removing party would always remain subject to the bar to appeal of § 1447(d), even though the removed party stands outside that statute.

The solution to that skewed and illogical procedural advantage can only be the interpretation of § 1452 and Rule 9027 for which Things Remembered contends: that these provisions set up an exclusive, separate and comprehensive scheme for bankruptcy context removals. Under Rule 9027, the removed party has the right at any time and forever to identify a procedural defect in removal, and, in order to to guard against abuse, the removing party has been afforded a continuing, corresponding right to appeal the decision. Under the scheme of § 1447(c) and (d), the removed party must act quickly in choosing a state or federal forum, and as a corresponding limitation, the removing party may not appeal.[11]

Since all of the necessary removal procedures are contained, in a fair and evenhanded manner, in § 1452 and Rule 9027, there is no need for importation of § 1447. This is especially so since to allow § 1447 to be applied asymmetrically to bankruptcy-context removals to the benefit of one party and not the other cannot have been intended and has the potential of working substantial mischief.

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[11] In general-context removals, this protective balance is assured by the doctrine of *Thermtron Products, Inc. V. Hermansdorfer*, 423 U.S. 336 (1976). If an untimely motion to remand on procedural defects is erroneously granted by the court, that remand would be "issued on grounds not authorized by § 1447(d)," *id.* at 343, and hence would be reviewable.

C. General Statements of Bankruptcy Policy and History Prove Nothing in the Face of the Inconsistencies and Incongruities Between § 1447 and § 1452

In 1978, Congress enacted 28 U.S.C. § 1478, the predecessor to § 1452. That enactment, and the accompanying procedural rules, produced (and evidenced the intent to produce) a self-contained bankruptcy-context removal scheme that is separate and apart from the general removal scheme of §§ 1441-1447. The Amicus contends that the history of removal and remand law and procedure should guide this Court insofar as it reflects "the larger context of the policies that animate bankruptcy administration as a whole," *Amicus Brief* at 27-28. That argument ultimately proves nothing related to the question now before this Court. Sections IA and IB of the *Amicus Brief* canvass cases which predate the enactment of § 1478 (the predecessor to § 1452) with the apparent purpose of showing that before the removal and remand provisions of § 1478 came into existence, the existing removal and remand provisions of §§ 1441-1447 (and predecessors) were applied in bankruptcy related actions. This proves that § 1478 was not applied before it was enacted. After that extended discussion, the Amicus cites *Hernandez* and *Pacor*, two of the current cases which describe the split between the Circuits, and arrives at the issue that *is* relevant here: "whether application of Section 1447(d) in the bankruptcy context under the current Bankruptcy Code is improper given the existence of 28 U.S.C. § 1452(b)." *Amicus Brief* at 17.

Section IC of the Amicus' Brief then states the argument that § 1447 and § 1452, which "govern different specie of remands," are not in conflict. *Amicus Brief* at

19. As support for this conclusion, the Amicus discounts the analysis of *Pacor v. Higgins*, 743 F.2d 964 (3rd Cir. 1984), which identified a number of inconsistencies and incongruities that would result from the simultaneous application of both statutes. Things Remembered provided an extended example of those inconsistencies and incongruities, *see Brief for Petitioner* at 20-21. The hypothetical demonstrated that there are removals subject to § 1452 which simply cannot bear the language or concepts of § 1447. Amicus has said nothing to reconcile the statues to the situation there posited. If the Amicus cannot provide an answer to that problem, it is worth nothing to say, as the Amicus does, that the differences just don't matter.[12]

But matter they do, and they matter in a way that supports a finding that § 1447 is not to be applied to remands in the bankruptcy context. Amicus contends, *Amicus Brief* at 21, that *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992), is instructive as to the interpretation of two statutes with overlapping application. It is -- but not to the effect Amicus urges. *Germain* preserved the effect of two overlapping statutes, because one reached additional situations the other did not. However, the enactment of the separate and comprehensive bankruptcy removal scheme now codified at § 1452 indicates Congress' intent to make that scheme exclusively operative within its separate and comprehensive domain.

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[12] The Amicus actually acknowledges only one difference between the two removal schemes: the time limits for removal in a bankruptcy and in a general removal context. That difference is said to be "a narrow one" unrelated to the statutes governing each separate and comprehensive scheme. *Amicus Brief* at 20. None of the other differences identified by *Pacor* and Things Remembered (the fora from which cases can be removed, the parties entitled to remove, and the extent of claims, causes of action, or an entire case that can be removed) are addressed.

This case is therefore more closely akin to *Federal Election Commission v. NRA Political Victory Fund*, 115 S.Ct. 537 (1994), *see Brief for Petitioner* at 23, than to *Germain*. The statutes considered in *NRA Fund,* a case that Amicus does not confront, were addressed to separate matters concerning a single subject -- the agency's authority to litigate. Analogous to the *NRA Fund* statutes (one concerning authority to appeal, and one concerning authority to petition for certiorari), one statute at issue here concerns general removals, and one statute concerns bankruptcy-specific removals. The latter governs to the exclusion of the former.

Indeed, the Amicus acknowledges that "if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate . . . as a repeal of the earlier act." *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936) *quoted in Brief of Amicus* at 25. Hence, even if this case necessarily must be viewed as one demanding an "implied repeal" of § 1447(d) in the bankruptcy removal context, § 1452 meets this test. All of the means and procedures for removal in the bankruptcy context are self-contained within § 1452 and Rule 9027, and reference to any other statute is unnecessary. Had Congress intended to foreclose appeal of any bankruptcy context remand order, § 1452 would have been worded, more simply, to make that bar explicit. The fact that § 1452 does *not* say "any order of remand is not reviewable" persuasively shows that that § 1447-type concept was not to be imported.

III.

THINGS REMEMBERED WAIVED NOTHING

Lastly, Petrarca makes two waiver-type arguments: first, that Things Remembered failed to appeal the Bankruptcy Court's holding that the bankruptcy removal was untimely and so "forfeited its right to appeal that question here," *Brief for Respondent* at 38-39; and second, that the question before the Court is moot as a result of state court actions in Colorado and Pennsylvania. Neither holds water.

A. Timeliness of the Bankruptcy Removal (1) is Not the Issue Before This Court and (2) Was Not Waived.

The Bankruptcy Court's ruling on timeliness of the bankruptcy removal is not before this Court; that argument will be appropriate, if at all, in the Sixth Circuit if this Court reverses. It makes no sense to say that Things Remembered failed to "preserve its right to make this appeal" when this "appeal" addresses the entirely different question of whether the Sixth Circuit can review the District Court's order.

In any event, Petrarca's analysis is incorrect. Things Remembered did not appeal the Bankruptcy Court's decision because it won. The Bankruptcy Court ordered precisely the relief that Things Remembered had asked of it: that the case be transferred to the Child World "home" bankruptcy court for determination of the motion to remand and all other issues. Things Remembered did argue to the District Court for affirmance of the Bankruptcy Court's order on two grounds: that the Bankruptcy Court ruling that the

general removal was timely was correct and, that the bankruptcy removal was untimely, incorrect. *See* Brief for Appellee (filed Aug. 31, 1993 in Case No. 5:93-CV-1582) at 5 n.4. As Things Remembered there stated, affirmance can be ordered on any ground, even one not relied on by the lower court. *E.g., United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924). Finally, the District Court considered the timeliness of the bankruptcy removal at length, and opined that the Bankruptcy Court had been correct in its ruling on that ground. (J.A. 27a-31a). In short, the issue was fully before the District Court, is not at all before this Court and so, here, is of no moment.

B. Neither the Question Before This Court Nor the Other Question Cited By Petrarca Is Moot

There are a number of problems with Petrarca's mootness argument based on other pending state court cases, the foremost being that the record in this Court is devoid of evidence of the basis for it. Because this Court has neither the pleadings, briefs, orders, nor any other papers from the state court cases before it, it has no way to determine conclusively what, Things Remembered submits, is certainly true: that Petrarca assigned to others his entire interest in two of the properties, as to which he is no longer a real party in interest, at issue here (without ever dismissing his claims on those properties in this lawsuit); that Colorado and Pennsylvania were the only fora in which all proper parties, including Petrarca's assignees, were amenable to service of process; that the state court actions involve questions exclusively of state law (involving the construction of guaranties) and are declaratory judgment actions only and do not involve the determination of money

obligations of Child World; thus that those cases can be adjudicated without reference to this case, the Child World bankruptcy, or any question of federal law; that, in any event, the state court cases involve only two of the seven properties at issue in this case; and that for all these reasons the state court actions do not "moot" anything at issue here.

CONCLUSION

Neither Petrarca's brief nor that of the Amicus demonstrate that Congress forbade review by the court of appeals of orders like this one. Rather, the plain language of the statutes, the analysis of the different removal schemes, the case law on point, and the revelant policies behind consolidation of bankruptcy-related litigation, support the conclusion that Things Remembered has such a right of appeal.

Accordingly, Petitioner Things Remembered, Inc. respectfully requests that this Court reverse the Sixth Circuit's order dismissing this appeal, and remand this case to that court for consideration of the merits.

Respectfully submitted,

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THE CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE I, SECTION 8:

The Congress shall have Power To Lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * *

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

* * * *

MOTION FILED
JUL 14 1995

(6)

No. 94-1530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THINGS REMEMBERED, INC.,

Petitioner,

vs.

ANTHONY A. PETRARCA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF THE CONNECTICUT BAR ASSOCIATION, COMMERCIAL LAW AND BANKRUPTCY SECTION, TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CONNECTICUT BAR ASSOCIATION, COMMERCIAL LAW AND BANKRUPTCY SECTION, IN SUPPORT OF RESPONDENT

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MOTION OF THE CONNECTICUT BAR ASSOCIATION, COMMERCIAL LAW AND BANKRUPTCY SECTION, TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.4 of the Rules of this Court, *amicus* the Connecticut Bar Association, Commercial Law and Bankruptcy Section ("CLBS") hereby moves for leave to file the attached brief *amicus curiae*.[1] Respondents have granted but

[1] The participation of CLBS as *amicus curiae* in this case has been approved by the Connecticut Bar Association.

Petitioner has refused consent for CLBS to file its brief *amicus curiae* in this case.[2]

As set forth in its bylaws, CLBS was organized to promote the objects of the Connecticut Bar Association ("CBA") within the field of commercial law and bankruptcy.[3] As set forth in relevant part in the constitution of the CBA:

> The objects of this Association shall be to advance the science of jurisprudence; to promote the administration of justice; [and] . . . to promote the leadership of the Bar in matters of public importance in the State and the Nation . . . .[4]

CLBS seeks leave to file the attached brief *amicus curiae* in support of its position that the administration of justice generally, and the administration of bankruptcy in particular, are impaired by the wasteful consequences of protracted litigation over where to litigate. CLBS contends that the decision of the Court of Appeals in this case furthers the goal of curtailing this type of wasteful litigation consistent with Congressional policy as expressed in the relevant statutes, and therefore CLBS supports affirmance of the decision of the court below. Consistent with Rule 37.1 of the Rules of this Court, CLBS seeks leave to file the attached brief to bring to the attention of the Court critical matters omitted by the parties.

CLBS contends that the Court of Appeals in this case correctly declined to review the order of the District Court remanding the underlying litigation back to the state tribunal in which it arose. The Court of Appeals did so on the basis of 28

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[2] CLBS files herewith the written consent of the Respondent to the submission of this brief.

[3] Bylaws of the Commercial Law and Bankruptcy Section of the Connecticut Bar Association, Art. I, § 2 (1984).

[4] The Constitution of the Connecticut Bar Association, Art. II, June 28, 1948.

U.S.C. §§ 1447(d) and 1452(b). Each of these statutory enactments contains a bar to review provision applicable to different kinds of remands: Section 1447(d) is applicable to jurisdictional remands of all kinds, and Section 1452(b) is applicable to "equitable" remands in bankruptcy cases. Petitioner contends that neither provision applies in this case.

CLBS has reviewed both the Brief of Petitioner filed in this case and the Brief of Respondent to be filed in this case. Neither Petitioner nor Respondent address in their submissions several crucial issues vital to consideration of this matter.

First, neither party addresses the relevant histories of the relevant statutes. Petitioner urges the Court to conclude that Section 1447(d) has no application in the bankruptcy context. However, the relevant historical background demonstrates that this provision, and its statutory predecessors, have applied in bankruptcy for over a century.

Second, Petitioner's argument rests on the presumption that Section 1452(b) implicitly repeals Section 1447(d) in the bankruptcy context. However, among other things, neither party has briefed the relevant legislative histories behind the two statutes to elucidate the existence (or lack thereof) of the legislative intent necessary to effect such a repeal. CLBS contends that reference to the legislative histories, coupled with a lack of any true conflict between Sections 1447(d) and 1452(b) (as well as other considerations), demonstrate that Congress did not intend the repeal of Section 1447(d) in the bankruptcy context and that no such intent can be presumed.

Third, neither party has briefed the issue of the significance of Sections 1447(d) and 1452(b) in the larger context of bankruptcy administration as a whole, nor have the parties briefed on a comparative basis the question of whether the decision of the court below is consistent or at odds with Congress' systematic effort across other analogous bankruptcy statutes to curtail protracted litigation over where to litigate in the bankruptcy appellate context. CLBS contends that the decision of the court below is consistent with Congress' larger effort in this regard.

Because of these omissions, and because of CLBS's interest in the resolution of the case at bar, CLBS requests leave to file the attached brief as *amicus curiae*.

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No. 94-1530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THINGS REMEMBERED, INC.,

Petitioner,

v.

ANTHONY A. PETRARCA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CONNECTICUT BAR ASSOCIATION, COMMERCIAL LAW AND BANKRUPTCY SECTION, IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of the Connecticut Bar Association, Commercial Law and Bankruptcy Section ("CLBS") as *amicus curiae*.[1] CLBS has obtained and files herewith the written consent of the Respondent to the submission of this brief. Petitioner, however, has refused its

[1] The participation of CLBS as *amicus curiae* in this case has been approved by the Connecticut Bar Association.

consent. Accordingly, pursuant to Rule 37.4 of the Rules of this Court, CLBS files herewith its motion for leave to file this brief as *amicus curiae*.

As set forth in its bylaws, CLBS was organized to promote the objects of the Connecticut Bar Association ("CBA") within the field of commercial law and bankruptcy.[2] As set forth in relevant part in the constitution of the CBA:

> The objects of this Association shall be to advance the science of jurisprudence; to promote the administration of justice; [and] . . . to promote the leadership of the Bar in matters of public importance in the State and the Nation . . . .[3]

CLBS submits this brief in support of its position that the administration of justice generally, and the administration of bankruptcy in particular, are impaired by the wasteful consequences of protracted litigation over where to litigate. The decision of the Court of Appeals in this case furthers the goal of curtailing this type of litigation and CLBS supports affirmance of the decision of the court below. Consistent with Rule 37.1 of the Rules of this Court, CLBS submits this brief to bring to the attention of the Court critical matters omitted by the parties.

STATEMENT

Respondent commenced the underlying litigation in this case in state court in Ohio on March 18, 1992.[4] Petitioner subsequently removed the action to federal court.[5] The instant

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[2] Bylaws of the Commercial Law and Bankruptcy Section of the Connecticut Bar Association, Art. I, § 2 (1984).

[3] The Constitution of the Connecticut Bar Association, Art. II, June 28, 1948.

[4] (J.A. at 18a).

[5] (J.A. at 19a).

controversy arises from the District Court's decision to remand that litigation to the state tribunal in which it arose.

The District Court ordered the remand for jurisdictional reasons, specifically finding that Petitioner had failed to timely remove the action to the federal forum.[6] On appeal, the Court of Appeals for the Sixth Circuit refused to review the propriety of the District Court's remand order, citing lack of appellate jurisdiction under two statutes: 28 U.S.C. § 1452(b) and 1447(d).[7]

SUMMARY OF ARGUMENT

Sections 1452(b) and 1447(d) each govern different types of remands. By its terms, Section 1452(b) applies only in the bankruptcy context and expressly bars appellate review of a district court's decision to remand on "*equitable*" grounds.[8] In contrast, Section 1447(d) is a statute of general applicability. Except with respect to certain civil rights actions,[9] it expressly bars appellate review of any order remanding on *jurisdictional* grounds.[10]

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[6] (J.A. at 31a).

[7] (J.A. at 36a).

[8] 28 U.S.C. § 1452(b) (1990) (emphasis added).

[9] Section 901 of the Civil Rights Act of 1964 amended Section 1447(d) to permit review of remand orders in certain civil rights cases. Civil Rights Act of 1964, Pub. L. No. 88-352, § 901, 78 Stat. 266. There are two other exceptions not contained in Section 1447(d). First, 28 U.S.C. § 1441a(1)(3)(C) (1991) grants the Resolution Trust Corporation the right to appeal "any order of remand entered by a United States district court". A similar provision grants the same right to the Federal Deposit Insurance Corporation. 12 U.S.C. § 1819(b)(2)(C) (1991). Second, several different statutes grant the United States the right to appeal remand orders entered in cases involving the property rights of certain tribes of American Indians. *See* 25 U.S.C. § 487(d) (1968), 25 U.S.C. § 642(b) (1970), and 25 U.S.C. § 670 (1972); *see also* Act of August 4, 1947, 61 Stat. 732.

[10] 28 U.S.C. § 1447(d) (1991); *see Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 346 (1976) (Section 1447(d) bars review of remand orders issued for lack of jurisdiction).

Petitioner contends that appellate review of the District Court's remand order is not barred by either of these provisions. First, Petitioner contends that Section 1452(b) does not apply in this case because Section 1452(b) only prohibits review of equitable remand orders, not jurisdictional ones, and the District Court's remand order here was jurisdictional in nature.[11] Second, Petitioner argues that Section 1447(d)'s prohibition against review of jurisdictional remand orders cannot apply in bankruptcy because to do so would create " 'incongruous results' and 'needless conflict and inconsistencies' " with Section 1452(b).[12] Regardless of whether Petitioner's first argument is correct, its second argument manifestly is not and Section 1447(d) expressly bars review of the District Court's remand order in this case.

First, Petitioner presents its argument in an historical vacuum. For well over a century, Sections 1441-1451 and their statutory predecessors (including Section 1447(d) and its statutory predecessors) have applied to removals and remands in bankruptcy cases. Indeed, before the enactment in 1978 of the immediate statutory predecessor to Section 1452(b),[13] removals and remands in bankruptcy cases were routinely effected *exclusively* pursuant to these general provisions. Since 1887, these general provisions have consistently enforced the principle that jurisdictional remand orders cannot be appealed. Petitioner's argument is thus at odds not only with the express language of the current Section 1447(d) but also over 100 years of settled law on the subject.

Second, given the relevant history behind Section 1447(d), Petitioner's argument that the statute does not apply in bankruptcy requires the inference that, in enacting Section 1452(b), Congress intended to repeal application of Section

[11] (Petitioner's Brief, at 8-18).

[12] (Petitioner's Brief, at 19 (quoting *Pacor v. Higgins*, 743 F.2d 984, 992 (3d Cir. 1984)).

[13] 28 U.S.C. § 1478 (1978) (repealed 1984).

1447(d) in the bankruptcy context. There is, however, no basis for such an inference. Sections 1452(b) and 1447(d) simply do not conflict, let alone irreconcilably so, and there is nothing in the legislative history or purpose of either statute that supports an implicit repeal. In the absence of an irreconcilable conflict, there is no reason to preclude application of the statute in accordance with its terms. *See, e.g., Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992) ("so long as there is no 'positive repugnancy' between the two laws, . . . a court must give effect to both.").

Petitioner also urges the Court to conclude that Section 1447(d) does not apply on the ground that appellate review of jurisdictional remands in bankruptcy is desirable due to the complexity of bankruptcy jurisdiction and the need for further judicial development in this important area.[14] In making this argument, however, Petitioner ignores the larger context of bankruptcy administration as a whole and the proper place for extensive consideration of its jurisdictional complexities.

As Justice Scalia remarked in *Bowen v. Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting), "[n]othing is more wasteful than litigation about where to litigate . . . ." Bankruptcy administration is particularly sensitive to such waste, given the inherent lack of resources present in most bankruptcy cases and the fact that Congress intended bankruptcy administration to be expeditious and inexpensive.[15] Questions of bankruptcy jurisdiction certainly deserve careful attention on appeal, but removal is simply the wrong place for it.

As this case demonstrates, the process of litigating over where to litigate is often cumbersome, time-consuming,

[14] (Petitioner's Brief, at 24-25).

[15] *See, e.g., National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 517 n.1 (1984) (noting that Congress enacted the business reorganization provisions of the Bankruptcy Code "with the intention that business reorganizations should be quicker and more efficient . . .") (citing H.R. Rep. No. 95-595, p. 5 (1977)).

expensive, and, sometimes, difficult to comprehend. In the matter *sub judice*, the ostensible reason for the removal to the District Court in Ohio was that the state court action was related in some way to the bankruptcy case of a debtor seeking reorganization in a bankruptcy court in New York.[16] That bankruptcy case, however, is now long since over,[17] yet the parties in this case are still engaged in litigating over whether the Petitioner may have the case tried in a court that in all likelihood no longer would have jurisdiction over the matter.[18]

The questionable value of the endeavor is thus self-evident, and yet it is likely to repeat itself if the type of appellate review sought by Petitioner is permitted. Congress clearly intended to foreclose this sort of waste and has done so by statute for over 100 years. Furthermore, in each instance where it intends to exempt a matter from the general scope of Section 1447(d), it does so expressly, not implicitly.[19] For the reasons summarized above and discussed in detail below, this Court should affirm the decision of the Court of Appeals.

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[16] Petitioner's strategy was to obtain removal to the District Court in Ohio and then a transfer of the case to the Southern District of New York where the bankruptcy was pending. (*See* J.A. at 16a and 20a).

[17] *In re Child World Inc.*, Case No. 92 B 20887 (JG) (Bankr. S.D.N.Y.). The bankruptcy court confirmed the plan of the related debtor on June 24, 1994.

[18] Jurisdiction would likely be lacking because, at this point, the outcome of the litigation probably would have no impact on the administration of the debtor's bankruptcy estate. *See, e.g., In re Gardner*, 913 F.2d 1515, 1518-19 (10th Cir. 1990) (where dispute "not otherwise related and would not affect the distribution of assets and administration of the bankruptcy estate, we hold the bankruptcy court lacked jurisdiction to resolve the dispute"); *In re Hall's Motor Transit Co.*, 889 F.2d 520, 522-23 (3d Cir. 1989) ("the usual test of determining whether a civil proceeding, such as we have here[between two non-debtor parties], is related to bankruptcy is whether 'the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.'") (citing *Pacor v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

[19] *See* note 9, *supra*.

ARGUMENT

I. SECTION 1447 AND ITS STATUTORY PREDECESSORS HAVE LONG APPLIED IN BANKRUPTCY AND THERE IS NO BASIS TO CONCLUDE THAT SECTION 1447(d) DOES NOT APPLY IN THIS CASE.

The history of Section 1447(d) and its statutory predecessors is one marked by three relevant themes: promotion of judicial economy, generous construction towards that end, and long-standing application in the bankruptcy context. Likewise, the comparatively brief history of Section 1452(b) echoes the same themes, but its application is necessarily slightly different. As this Court has made clear, Section 1447(d) governs remands for jurisdictional reasons alone. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 346 (1976). On the other hand, Section 1452(b) expressly applies to remands for "equitable" reasons--a type of remand Section 1447 clearly does not authorize.

Given the different focus of each of these two provisions, it is hardly surprising that the specific rules governing their application are distinct in some respects. However, these differences do not create a conflict, and there is no valid reason to infer that, in enacting Section 1452(b), Congress intended to repeal Section 1447(d) in bankruptcy. Indeed, indulging in such a presumption would eliminate the only express statutory basis in bankruptcy for remands based on jurisdictional grounds.[20] Although Petitioner would like to open up this void, it is a void that Congress filled in long ago. Since the interpretation urged by Petitioner is at odds with the

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[20] This is true, of course, only to the extent that the phrase "on any equitable ground" contained in Section 1452(b) is construed as not embracing jurisdictional remands. Petitioner argues that this phrase does not embrace jurisdictional remands. (Petitioner's Brief, at 13-18). Respondent argues that it must. (Respondent's Brief, at 14-31). If Respondent is correct, then Section 1452(b) supplies a basis for affirmance of the decision below independent of Section 1447(d).

long-standing purpose of Sections 1447(d) and 1452(b) as well as the plain language of Section 1447(d), it is unwarranted.

A. The History, Purpose, Language and Policy of Section 1447(d) Clearly Proscribe Review of Remand Orders such as the Remand Order in this Case.

The end of the Civil War marked the beginning of a dramatic rise in the jurisdiction of the federal courts, including an expanded power of removal.[21] In the immediate post-Civil War era, removal jurisdiction reached its zenith with the Act of March 3, 1875.[22]

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[21] The original Judiciary Act of 1789 provided for removal in a narrow range of controversies. 1 Stat. 73, § 12; *see* 1A James W. Moore et al., Moore's Federal Practice ¶ 0.156[1] at 14 (2d ed. 1993) (discussing removal provisions of the Act of 1789 and *ad hoc* removal legislation until the Civil War). After the Civil War, however, Congress greatly expanded the power. *See* Frankfurter and Landis, The Business of the Supreme Court, A Study in the Federal Judicial System, pp. 61-63 n. 22 (MacMillan, 1928) [hereinafter "Business of the Supreme Court"]; *see also* 1A Moore, Moore's Federal Practice *supra* ¶ 0.156[1] at 14-17.

[22] 18 Stat. 470, § 2; *see Gibson v. Bruce*, 108 U.S. 561, 562 (1883) ("the act of 1875 is radically different from any which preceded it"). Section 2 of this Act provided as follows:

> That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State of foreign states, citizens, or subjects, either party may remove said suit into the circuit court of the United States for the proper district.
>
> And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States,

(Footnote continued)

However, in addition to its impact on an already overloaded federal judiciary,[23] the ability to remove an unprecedented number of new cases "to distant federal courts made litigation costly as well as slow, and thus doubly harassing."[24] This Court was particularly affected. The practice of prosecuting appeals of removal and remand orders contributed significantly to the Court's overburdened docket which, by 1890, had reached an impossible load of 1800 cases.[25] As congestion and other problems within the federal judicial system worsened, Congress moved to restrict the removal provisions with the Act of March 3, 1887.[26]

> and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

18 Stat. 470, § 2. Section 2 of the Act provided for the right of removal. Section 3 prescribed how the right might be effected. *See* 1A Moore, Moore's Federal Practice *supra* ¶ 0.156[1] at 17.

[23] *See* Business of the Supreme Court, at 77-78 (observing in the context of severe congestion within the federal judicial system that the Act of 1875, expanding the provisions for removal, "added voluminously to the business of the federal courts without equipping them to discharge it.").

[24] Business of the Supreme Court, at 80.

[25] *See Morey v. Lockhart*, 123 U.S. 56, 57 (1887) (noting that, under the authority of Section 5 of the Act of 1875, "numerous cases have been brought to this court by appeal or writ of error for the review of such [remand] orders."); *see also* Business of the Supreme Court, at 86 (noting that from the October term of 1884 to the term in 1890, the Supreme Court's docket had risen from an impossible level of 1315 cases to the "absurd total of 1800"). Ultimately, this congestion found meaningful relief in the substantial reforms in 1891. *See also id.* at 93-102 (chronicling the efforts at reform leading up to the Act of March 3, 1891, 26 Stat. 826, creating, among other things, the circuit courts of appeals).

[26] 24 Stat. 552-53; *see* Business of the Supreme Court, at 93-95 (describing some of its provisions and observing that the Act "eased the pressure upon the lower courts"). The Act of 1887 is sometimes referred to as the Act of 1887-88, due to its reenactment August 13, 1888 to correct some technical mistakes. 25 Stat. 433; *see Ex parte Pennsylvania Co.*,

(Footnote continued)

The Act of 1887 made removal generally less available and more exacting.[27] In addition, for the first time it expressly prohibited appellate review of remand orders.[28] This last feature marked a broad departure from the Act of 1875, which had expressly authorized such review.[29] With respect to the scope of this novel bar to review provision, this Court explained in *Morey v. Lockart*, 122 U.S. 56, 58 (1997), that the Act of 1887 eliminated *any* right of review regardless of the ground for the remand.[30] In addition, although the Act did not mention extraordinary review by writ of mandamus, this

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137 U.S. 451, 454 (1890); 1A Moore, Moore's Federal Practice *supra* ¶ 0.156[1] at 17.

[27] *See* 1A Moore, Moore's Federal Practice *supra* ¶ 0.156[1] at 17-18 (discussing Act of 1887).

[28] Specifically, the Act provided as follows:

> Whenever any cause shall be removed from any State court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed.

24 Stat. 553; *see Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. at 346-47 (discussing provision).

[29] Section 5 of the Act of 1875 provided that any "order of said circuit court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be." 18 Stat. 472, § 5. Before the Act of 1875, review of remand orders had not been permitted because such orders were held to be not within the contemplation of the appellate jurisdiction provisions. *Railroad Co. v. Wiswall*, 90 U.S. (23 Wall.) 507, 508 (1875); *see also Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 346 (1976); *State of Georgia v. Rachel*, 384 U.S. 780, 786 n.6 (1966) (discussing development); *Morey v. Lockhart*, 123 U.S. at 57 (describing previous practice).

[30] *See also* B.C. Moon, The Removal of Causes, § 204, at 637 (The Banks Law Publishing Co. 1901) (observing that the Act of 1887 "took away the right to review . . . no matter on what ground the removal was procured").

Court nonetheless construed the prohibition to apply to this form of relief as well.[31]

The removal section of the Judicial Code of 1911[32] embodied in substantial form the provisions of the Act of 1887,[33] and included a bar to review provision virtually identical to that of its predecessor.[34] Although the statute again provided no express prohibition against review through mandamus, this Court in *In re Matthew Addy Steamship Commerce Corp.*, 256 U.S. 417, 420 (1921), reaffirmed its prior determination that Congress intended to preclude all forms of appellate review, not simply those listed in the statute.[35]

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[31] In *Ex parte Pennsylvania*, 137 U.S. at 454, this Court concluded as follows:

> In terms, [the Act of 1887] only abolishes appeals and writs of error, . . . and does not mention writs of *mandamus*; and it is unquestionably a general rule that the abrogation of one remedy does not affect another. But in this case, we think, it was the intention of congress to make the judgment of the circuit court remanding a cause to the state court final and conclusive.

[32] Jud. Code, § 28 (1911), 28 U.S.C. § 71 (1940).

[33] 1A Moore, Moore's Federal Practice *supra* ¶ 0.156[1] at 18-19. There was one intermediary statute between the Act of 1887 and the Judicial Code of 1911. *See* Act of April 5, 1910, 36 Stat. 291, § 1.

[34] As amended in 1914, Section 28 of the Judicial Code of 1911 provided in pertinent part as follows:

> Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed.

28 U.S.C. § 71 (1940). *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. at 347-48 (discussing provision).

[35] In reaching its determination, the Court noted with regret the split of authority in the lower courts on the particular substantive issue at bar, but

(Footnote continued)

Subsequently, the Judicial Code of 1948 codified the federal removal provisions of its predecessors in 28 U.S.C. §§ 1441-1451 (as amended). Although the Judicial Code of 1948 failed to codify the bar to review provision of Section 28 of the Judicial Code of 1911, this oversight[36] was remedied in 1949 with the addition of Section 1447(d).[37] The current Section 1447(d) now reads in full as follows:

> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title [pertaining to certain civil rights cases] shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447(d).[38]

In *United States v. Rice*, 327 U.S. 742, 751-52 (1946), this Court summarized the long-standing policy underlying the bar to review provision of Section 1447(d) in the following terms:

> Congress, by the adoption of the [bar to review provisions of the various removal Acts since 1887], as

concluded nonetheless that "section 28 of the Judicial Code is controlling, and Congress alone has power to afford relief." *Id. Accord Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 380-81 (1937) (quoting *Ex parte Pennsylvania*, 137 U.S. 451, 454 (1890)).

[36] *See* 1A Moore, Moore's Federal Practice *supra* ¶ 0.169[2.-1] at 686, n.1; *see also Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. at 347-48 (mentioning oversight).

[37] As it first appeared, Section 1447(d) provided as follows: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 63 Stat. 89; *see* 1A Moore, Moore's Federal Practice *supra* ¶ 0.169[2.-1] at 686.

[38] *See* H.R. Rep. No. 352, 81st Cong., 1st Sess. (1949), *reprinted in* 1949 U.S.C.C.A.N. 1248, 1268 (providing that the new Section 1447 was included "to remove any doubt that the former law as to the finality of an order to remand to a State court is continued").

> thus construed [by this Court], established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed. This was accomplished by denying any form of review of an order of remand, and, before final judgment, of an order denying remand. In the former case, Congress has directed that upon the remand the litigation should proceed in the state court from which the cause was removed.

The statute and its policy are thus clear: there shall be no review of remand orders.[39]

An exception to this blanket rule is to be found in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), which involved a properly removed state court proceeding that the district court remanded, not on any proper statutory basis, but instead on the basis of the court's crowded docket.[40] Finding such grounds to be completely and transparently unauthorized by Section 1447(c),[41] the Court held that Section

[39] *Accord Mobile Corp. v. Abeille General Ins. Co.*, 984 F.2d 664, 666 (5th Cir. 1993); *Chandler v. O'Bryan*, 445 F.2d 1045, 1057 (10th Cir. 1971); *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 533 (6th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); *In re MacNeil Bros. Co.*, 259 F.2d 386, 388 (1st Cir. 1958); *Peerless Weighting & Vending Mach. Corp. v. Public Bldg. Comm. of Chicago*, 209 F. Supp. 877, 882 (N.D. Ill. 1962), *app. dismissed*, 371 U.S. 801 (1962).

[40] *Id.* at 340-41.

[41] At the time, Section 1447(c) read as follows:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs.

28 U.S.C. § 1447(c) (1991). Amended in 1988, the current provision deletes the word "improvidently", adds a 30 day time limit for the filing of motions to remand, and alters the provision in other non-material respects. The Judicial Improvements and Access to Justice Act of 1988, Pub. L. 100-702, 102 Stat. 4670.

1447(d) did not apply. However, in reaching this conclusion, the Court was careful to admonish that "we neither disturb nor take issue with the well-established general rule that § 1447(d) and its predecessors were intended to forbid review by appeal or extraordinary writ of any order remanding a case on the grounds permitted by the statute."[42] Furthermore, as made clear in *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723, 724 (1977), "*Thermtron* did not question but re-emphasized the rule that § 1447(c) remands are not reviewable." *Thermtron* is thus the proverbial exception that proves the rule. Since the unusual facts of *Thermtron* are not present in this case, *Thermtron* presents no barrier to application of Section 1447(d) here.

B. Section 1447 and Its Statutory Predecessors Have Long Applied in Bankruptcy.

It has long been recognized that many types of actions relating to bankruptcy cases may be adjudicated in courts other than the federal bankruptcy court (including the state courts or some other federal forum), subject to any relevant statutory right of removal.[43] Until the Bankruptcy Reform Act of 1978,[44] however, the Nation's various bankruptcy statutes included no special removal or remand provisions of their

[42] *Thermtron*, 423 U.S. at 351-52.

[43] *See, e.g., Bardes v. First National Bank of Hawarden*, 178 U.S. 524, 532 (1900) (discussing concurrent jurisdiction over many types of suits related to bankruptcy matters in the context of the Bankruptcy Acts of 1867 and 1898); *see also* 28 U.S.C. § 1409(b) (1984) (requiring certain actions in bankruptcy to be brought in an appropriate forum in the district in which the defendant resides); 28 U.S.C. § 1334(a)-(b) (1994) (providing in subsection (a) that the District Courts shall have exclusive and original jurisdiction over bankruptcy cases, but providing in subsection (b) that the district courts have original but not exclusive jurisdiction of proceedings arising under title 11, or arising in or related to cases under title 11).

[44] Pub. L. 95-598, 92 Stat. 2549.

own.[45] Instead, removal and remand was routinely accomplished and analyzed pursuant to the general federal removal and remand provisions of Sections 1441-1451 and their statutory predecessors.

For example, in *Woolridge v. McKenna*, 8 F. 650 (Cir. Ct. Tenn. 1881), the assignee[46] of a bankrupt under the Bankruptcy Act of 1867 commenced an action in state court against a minor defendant seeking the avoidance of a conveyance of land.[47] The minor defendant sought removal to the federal circuit court[48] pursuant to the Act of 1875.[49] In deciding to remand the matter for lack of jurisdiction over the minor for want of a binding appearance by a representative authorized to appear on the minor's behalf and effect the removal,[50] the court analyzed the removal process in bankruptcy as follows: "the assignee has been vested with power to bring this suit in the state court where he did bring it, *and*

[45] The Nation has had five bankruptcy Acts: The Bankruptcy Act of 1800, 2 Stat. 19 (repealed 1803); The Bankruptcy Act of 1841, 5 Stat. 440 (repealed 1843); The Bankruptcy Act of 1867, 14 Stat. 517 (repealed 1878); The Bankruptcy Act of 1898, 30 Stat. 544 (repealed 1979), and the current Bankruptcy Code enacted pursuant to the Bankruptcy Reform Act of 1978.

[46] Section 13 of the Bankruptcy Act of 1867 provided for creditors to elect "one or more assignees of the estate of the debtor . . . ." The function of the assignee was similar to that of a trustee under the current Bankruptcy Code. *See* 11 U.S.C. § 702 (1984) (election of trustee in Chapter 7 case); 11 U.S.C. § 704 (1986) (duties of trustee).

[47] *See id.* at 670, 672. Section 35 of the Bankruptcy Act of 1867 provided for the avoidance of fraudulent transfers, and empowered the assignee to "recover the property, or the value thereof, as assets of the bankrupt." *See* 11 U.S.C. § 548 (1994) (fraudulent transfers).

[48] The Judicial Code of 1911 abolished the circuit courts, leaving the present structure of District Courts, the Circuits Courts of Appeals and the Supreme Court. Judicial Code of 1911, § 289, 36 Stat. 1167.

[49] *Woolridge*, 8 F. at 670.

[50] *Id.* at 675-76.

we can only obtain jurisdiction by removal as in other cases."[51]

Similarly, in *Feibelman v. Packard*, 109 U.S. 421 (1883), a district court sitting in bankruptcy ordered the seizure of property of the debtor in the hands of a third party.[52] The third party commenced an action in state court against the marshal who had seized the property. While the action was pending, the Act of 1875 took effect, the suit was removed pursuant to its provisions, and this Court subsequently affirmed the propriety of the removal as relating to a question in bankruptcy and an order of the bankruptcy court.[53] *See also Spencer v. Duplan Silk Co.*, 191 U.S. 526, 531-32 (1903) (case concerning review of appeal of decision in bankruptcy matter removed to federal court on grounds of diverse citizenship under general removal statute).

Subsequently, under the Bankruptcy Act of 1898, removals and remands were likewise accomplished under the general removal statutes. As explained in the leading bankruptcy treatise of the time: "removal of the cause to the proper district court may be had *only under the same conditions as govern removal generally*." 2 James W. Moore et al., Collier on Bankruptcy, ¶ 23.21 at 645 (14th ed. 1976) (emphasis added). Thus, for example, whenever a trustee in bankruptcy commenced an action in state court against a defendant under a provision of the Bankruptcy Act, the defendant was permitted to "obtain removal to the federal court only on the same basis

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[51] *Id.* at 676-77 (emphasis added).

[52] *Id.* at 424-25.

[53] The Court phrased the question as follows: "The question . . . is, whether under the bankrupt act of 1867, the district court of the United States, sitting in bankruptcy, has jurisdiction to order the seizure and detention of goods, the property of the bankrupt, although in possession of another under claim of title, and whether, in a subsequent action against the officer for obedience to such an order, he may justify the seizure by proof that the title to the property was at the time in the bankrupt." *Id.* at 426.

as in any other case." 2 Moore, Collier on Bankruptcy *supra* ¶ 23.21 at 647.[54]

Lastly, courts acting in cases under the current Bankruptcy Code[55] have also applied the bar to review principle found in Section 1447(d) to bar review of jurisdictional remand orders. *See, e.g., Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1225 (7th Cir. 1991) ("Sections 1447 and 1452 belong to Chapter 89 of Title 28 . . . [and n]othing in text or structure suggests that the general provisions of § 1447 are inapplicable to cases removed under § 1452, any more then they would fall away for removals under § 1442 (federal officers), § 1442a (members of armed forces), or other statutes authorizing removal.").[56] *Contra Pacor v. Higgins*, 743 F.2d 984, 992 (3d Cir. 1984) (holding that Section 1447(d) does not apply in bankruptcy). The issue before the Court is whether application of Section 1447(d) in the bankruptcy context under the current Bankruptcy Code is improper given the existence of 28 U.S.C. § 1452(b).

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[54] *See also, e.g., Tenenbaum v. Walter E. Heller & Co.*, 308 F. Supp. 1085, 1088-89 (S.D.N.Y. 1970) (applying general remand provisions in analyzing whether to remand actions related to bankruptcy case); *Whitman v. Chicago & N.W. Ry. Co.*, 70 F. Supp. 9, 11-12 (D. Minn. 1947) (analyzing issue of remand pursuant to the general federal removal provisions); *Swofford v. Cornucopia Mines of Oregon*, 140 F. 957, 958-59 (Cir. Ct. D. Ore. 1905) (remanding case removed by trustee in bankruptcy).

[55] 11 U.S.C. § 101, et seq. (1994)

[56] Similarly, this Court in *Rice* suggested that Section 1447(d) should be construed as a statute of general applicability:

> As we have already indicated, and as the legislative history shows, the [bar to review provisions] of the Act of 1887 were intended to be applicable not only to remand orders made in suits removed under the Act of 1887, but to orders of remand made in cases removed under any other statutes, as well.

United States v. Rice, 327 U.S. 742, 751-52 (1946); *see also Employers Reinsurance Corp. v. Bryant*, 299 U.S. at 380-81 (the provisions of the Act of 1887 "are intended to reach and include all cases removed from a state court into a federal court and remanded by the latter").

C. Nothing in Section 1452 Prevents Application of Section 1447(d) in this Case.

Section 1452 provides as follows:

> (a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title [the general bankruptcy jurisdictional provision].
>
> (b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision not to remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.[57]

By its own terms, Section 1452 authorizes remands "on any equitable ground", and this has been held to embrace a variety of non-jurisdictional justifications. *See, e.g., River Cement Co. v. Bangert Bros. Constr. Co.*, 852 F.Supp. 25, 27 (D. Colo. 1994) (remanding case after considering the following factors: "1) duplication of judicial resources; 2) uneconomical use of judicial resources; 3) effect of remand on the administration of the bankruptcy estate; 4) case involves questions of state law better addressed by a state court; 5) comity; 6) prejudice to the involuntarily removed parties; 7) lessened

[57] 28 U.S.C. § 1452 (1990).

possibility of an inconsistent result; and 8) expertise of the court where the action originated").[58]

In contrast, as demonstrated above, Section 1447 is limited to remands on jurisdictional grounds. The two thus govern different specie of remands. They do not conflict.

In arguing that Sections 1452(b) and 1447(d) do conflict, Petitioner relies heavily on *Pacor v. Higgins*, 743 F.2d 984 (3d Cir. 1984). In *Pacor*, however, the Court of Appeals for the Third Circuit indulged in a demonstrably erroneous analysis.

First, the court compared the general removal provisions, 28 U.S.C. §§ 1441-1447, to Section 1452. Second, the court identified differences between these two sets of provisions. Third, the court concluded that, since there are differences between the general provisions and Section 1452, *none* of the provisions of the former could apply in the context of the latter.[59]

Concededly, there are, of course, differences between *removal* practices under Sections 1441-1447 and Section 1452(b). As Petitioner points out,[60] it is true, for example, that

[58] *See also Scherer v. Carroll*, 150 B.R. 549, 552 (D. Vt. 1993); *In re Riverside Nursing Home*, 144 B.R. 951, 956-957 (S.D.N.Y. 1992); *Drexel Burnham Lambert Group, Inc. v. Vigilant Ins. Co.*, 130 B.R. 405, 407 (S.D.N.Y. 1991); *Lone Star Indus., Inc. v. Liberty Mut. Ins.*, 131 B.R. 269, (D. Del. 1991); *Baxter Healthcare Corp. v. Hemex Liquidation Trust*, 132 B.R. 863, 867-868 (N.D. Ill. 1991); *Cook v. Griffin*, 102 B.R. 875, 877 (N.D. Ga. 1989); *Gorse v. Long Neck, Ltd.*, 107 B.R. 479, 482 (D. Del. 1989); *In re Fay*, 155 B.R. 1009, 1012 (Bankr. E.D. Mo. 1993); *In re Branded Products, Inc.*, 154 B.R. 936, 947 (Bankr. W.D. Tex. 1993); *In re El Paso Pharm. Inc.*, 130 B.R. 492, 497 (Bankr. W.D. Tex. 1991); *In re Ross*, 64 B.R. 829, 835 (Bankr. S.D.N.Y. 1986); *Zweygardt v. Colorado Nat'l Bank of Denver*, 52 B.R. 229, 234-235 (Bankr. D. Colo. 1985); 1 Lawrence P. King, Collier on Bankruptcy ¶ 3.01[4][g] at 3-98-99 (15th ed. 1994) (discussing factors and Section 1452(b) generally).

[59] *Id.* at 992.

[60] (Petitioner's Brief, at 24-25).

the time for filing a removal petition under the general provisions is different from practice under Section 1452. This difference, however, is a narrow one and arises not because of a conflict between Sections 1447(d) and 1452(b), but because of a difference between Section 1446(b) and Rule 9027(a)(2) of the Federal Rules of Bankruptcy Procedure.[61] This hardly suffices to demonstrate an implicit repeal of Section 1447(d) in bankruptcy.

It cannot be the case that a rule of procedure can create a conflict that results in the repeal *sub silentio* of an important statutory prohibition that has applied in bankruptcy for over a century. This is particularly true given the prohibition expressed in 28 U.S.C. § 2075 (1994) that the rules of bankruptcy procedure "shall not abridge, enlarge, or modify any substantive right."[62]

In addition, it should be pointed out that, in the specific context of remand procedure, there is *no* conflict between Section 1447(c) (specifying the time limit for filing a motion to remand) and Fed. R. Bankr. P. 9027(d) (1991) (providing that a motion for remand shall be governed by Fed. R. Bankr. P. 9014 (1987), but not specifying a time limit). Lastly,

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[61] *Compare* 28 U.S.C. § 1446(b) (1991) (providing a thirty day time limit for the filing of the notice of removal) *with* Fed. R. Bankr. P. 9027(a)(2) (1991) (providing a formula for measuring the time limits for the filing of removal notices if the action is commenced before the bankruptcy petition is filed). It should be noted, however, that Fed. R. Bankr. P. 9027(a)(3) (1991) (specifying the time limit for filing a notice of removal if the action is commenced after the commencement of the bankruptcy case) is virtually identical to Section 1446(b).

[62] 28 U.S.C. § 2075 (1994). Furthermore, the differences in the filing deadline rules may be readily harmonized. For example, it might be concluded that Fed. R. Bankr. P. 9027 simply does not apply in any situation where Section 1446(b) does apply. *See, e.g., Intra Muros Trust v. Truck Stop Scale Co.*, 163 B.R. 344, 345 (N.D. Ill. 1994) (holding that thirty day time limit of Section 1446(b) applies in a bankruptcy removal under Section 1452 notwithstanding Fed. R. Bankr. P. 9027(a)(2)). *Contra In re Eagle Bend Development*, 61 B.R. 451, 458 (Bankr. W.D. La. 1986) (holding that Fed. R. Bankr. P. 9027 governs in bankruptcy removal cases).

differences between *removal* practice under Sections 1441-1451 and Section 1452 cannot justify ignoring Congress' clear expression in the *remand* context of its intent to curtail the wasteful practice of protracted litigation over where to litigate.

On this last point, this Court's analysis in *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992) is highly instructive. There this Court considered whether a jurisdictional statute applicable only in bankruptcy, 28 U.S.C. § 158(d) (1994), implicitly repealed a jurisdictional statute of general applicability, 28 U.S.C. § 1292(b) (1992). Respondent in that case urged that it did because (1) the general statute provided jurisdiction that the more specific statute did not and the specific statute should control, and (2) application of both 158(d) and 1292(b) would create an "unusual" overlap in the larger jurisdictional scheme since Section 1292's companion, 28 U.S.C. § 1291 (1982), largely provides the same kind of jurisdiction as does Section 158(d).[63] Recognizing, among other things, that the Courts of Appeals had long exercised in bankruptcy the type of jurisdiction provided in Section 1292,[64] and that an implicit repeal would leave the Courts of Appeals completely without jurisdiction in cases otherwise governed by Section 1292, this Court refused to infer an implicit repeal and, instead, concluded that Section 1292(b) must be applied as written regardless of any overlap that might arise between Section 158(d) and Section 1291. *Germain*, 503 U.S. at 253-54. This Court should reach the same conclusion in the context of Sections 1452(b) and 1447(d).

Furthermore, nothing in the legislative history behind Section 1452 indicates any evidence of a Congressional intent to repeal Section 1447(d) in the bankruptcy context. On the

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[63] *Germain*, 503 U.S. at 253-54; *see also id.* at 255 (Stevens, J., concurring) (noting the unusual overlap between Section 158(d) and 1291).

[64] *Id.* at 256 (O'Conner, J., concurring) ("Congress probably did not intend to deprive the Courts of Appeals of their long-standing jurisdiction over interlocutory appeals in bankruptcy.").

contrary, reference to the underlying purpose of Section 1452 only supports continued application of both provisions in accordance with their terms.

D. Reference to the Relevant Legislative History and Purpose of Section 1452(b) Refutes Petitioner's Position.

Section 1452 is derived almost verbatim from former 28 U.S.C. § 1478.[65] The text of Section 1478 was originally proposed in the House on January 4, 1977.[66] Subsequently, in preparation for enacting what ultimately became the Bankruptcy Reform Act of 1978 (the "Reform Act"),[67] the House passed a bankruptcy bill including language virtually identical to the 1977 proposal.[68] This language survived virtually

[65] *See* 1 King, Collier on Bankruptcy *supra* ¶ 3.01[4][a] at 3-88-89. Section 1478 was implicitly repealed by Pub. L. No. 98-353, 98 Stat. 335 (1984).

[66] H.R. 6, 95th Cong., 1st Sess. (1977). Previously, on January 17, 1975, a far more elaborate removal provision had been introduced in the Senate. Sen. 235, 94th Cong., 1st Sess. (1975). The bill would have authorized the bankruptcy court to remand any action as follows:

> (3) Remand When Removal Is Improvident. If at any time before final judgment entered by the bankruptcy court it appears that the action was removed improvidently and without jurisdiction, the bankruptcy court shall remand the action and may order the payment of just costs. A certified copy of the order of remand shall be mailed by the clerk of the bankruptcy court to the clerk of the court to which the case is remanded. The action may thereupon proceed in the court as if the removal had not occurred.

There was no provision governing review on appeal. Comments on the proposal were received at public hearing from two individuals. *See* Hearings on S. 235 and S. 236 Before Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 491 (statement of Rex Lee, Assist. Attorney General) and 806 (Statement of William T. Plumb, Jr., Esq.) (1975).

[67] Pub. L. No. 95-598, 92 Stat. 2549 (1978).

[68] H.R. 8200, 95th Cong., 2d Sess. (1978), 124 Cong. Rec. H466-472 (Feb. 1, 1978). H.R. 8200 provided as follows:

(Footnote continued)

unchanged in the final draft of the Reform Act.[69]

The only significant difference in the language of Section 1452 and 1478 is that Section 1452 contemplates removal to the district court, while Section 1478 contemplated removal directly to the bankruptcy court.[70] The reason for this change stems from this Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (Brennan, J., plurality opinion), invalidating the bankruptcy jurisdictional provisions. Following *Marathon*, Congress revamped the entire bankruptcy jurisdictional system, conferring a larger supervisory role on the district courts--hence the change in Section 1452.[71] As with the history of the enactment of Section 1478, however, nothing in the transformation of Section

Removal to the bankruptcy courts.

> (a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a Government unit to enforce such governmental unit's police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.
>
> (b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise.

[69] *See* Pub. L. No. 95-598, 92 Stat. 2667 (1978).

[70] *See* 1 King, Collier on Bankruptcy *supra* ¶ 3.01[4][a] at 3-89.

[71] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984); *see In re Clay*, 35 F.3d 190, 192-93 (5th Cir. 1994) (discussing *Marathon* and changes to bankruptcy jurisdictional system following it); *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1234-35 (3d Cir. 1994) (same); 1 King, Collier on Bankruptcy *supra* ¶ 3.01[4][a] at 3-89. Consistent with these revisions, Section 1452 now contemplates removal to the District Court, reference of the matter to a bankruptcy judge, and then a right of review of the bankruptcy judge's decision by the district court.

1478 into Section 1452 supports an implicit repeal of Section 1447(d).[72]

Section 1452 was subsequently amended as part of the Judicial Improvements Act of 1990. The amendment replaced the statute's general bar to review provision with a more specific one, clarifying the elimination of all right of review beyond the district court level by enumerating the appellate jurisdictional statutes expressly disabled by the provision.[73] On the issue of motive, the findings section of the Improvement Act identifies "[t]he problems of cost and delay in civil litigation" as the general target of the amendment.[74] Similarly, the legislative history explains the amendment to Section 1452(b) as follows:

> Section 309 would amend 11 U.S.C. § 305(c) and 28 U.S.C. 1334(c)(2) and 1452(b) to clarify that, with respect to certain determinations in bankruptcy cases, they forbid only appeals from the district courts to the courts of appeals, not from bankruptcy courts to the district courts.
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> . . .
>
> The proposed amendment would modify these three sections to provide that the decision of the bankruptcy court is not reviewable 'by the court of appeals . . . or by the Supreme Court of the United States . . . .' Such determinations would therefore be reviewable by the district court.
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> Speeding the disposition of these types of motions will better serve the purpose of the limitation on appeals from the district courts to the courts of appeals.[75]

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[72] *See* 1 King, Collier on Bankruptcy *supra* ¶ 3.01[4][b] at 3-89.

[73] Pub. L. No. 101-650, § 309, 104 Stat. 5089 (1990).

[74] Pub. L. No. 101-650, § 102, 104 Stat. 5089 (1990).

[75] 136 Cong. Rec. S17,580 (Oct. 27, 1990). *See also* Report of the Federal Courts Study Committee, April 2, 1990, at 77 (discussing recommended change to Section 1452(b)).

Far from suggesting the inapplicability of Section 1447(d) in the bankruptcy context, the legislative history to the 1990 amendment actually suggests the opposite: Congress intended to eliminate appellate review of orders to promote judicial economy and administrative efficiency. This is consistent with continued application of Section 1447(d) in bankruptcy, and not an implicit intent to repeal.

The foregoing demonstrates that there is no evidence to support the implicit repeal of Section 1447(d) in the bankruptcy context and, in urging repeal, Petitioner has failed to demonstrate otherwise. Reference to the relevant rules of statutory construction cements the conclusion that Section 1452(b) does not implicitly repeal Section 1447(d) in bankruptcy.

E. The Relevant Rules of Statutory Construction Refute Petitioner's Contention that Section 1447(d) Does Not Apply in Bankruptcy.

A cardinal rule of statutory construction often repeated by this Court dictates that repeals by implication are not favored and will not be found unless the congressional intent to repeal is "clear and manifest." *Red Rock v. Henry*, 106 U.S. 596, 602 (1883). *Accord Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92 (1871). The party urging implied repeal bears a heavy burden in establishing the requisite intent. *Amell v. United States*, 384 U.S. 158, 165-66 (1966); *see also Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (repeal by implication will not be lightly inferred).

As this Court has identified, repeal by implication may be tolerated in two specific, well-settled situations:

> (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.

Posadas, 296 U.S. at 503. Neither situation is present here.

Irreconcilability has been found only where it is "impossible" to give effect to both statutes. *See Wilmot v. Mudge*, 103 U.S. 217, 221 (1880). *Accord Germain*, 503 U.S. at 253 ("so long as there is no 'positive repugnancy' between the two laws, . . . a court must give effect to both.") (citation omitted); *TVA v. Hill*, 437 U.S. 153, 190 (1978); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 456-57, *reh'g denied*, 324 U.S. 890 (1945) ("Only a clear repugnancy between the old law and the new results in the former giving way . . ."); *Borden*, 308 U.S. at 198-99. Lacking here is anything remotely akin to the kind of irreconcilable conflict necessary to support the conclusion that one provision overturns the other in the bankruptcy context. *See Mancari*, 417 U.S. at 551; *Borden*, 308 U.S. at 198.

As this Court has stated in the context of defining when one statute may implicitly repeal another, "it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative or auxiliary." *Wood v. United States*, 41 U.S. (16 Pet.) 341, 362 (1842), *quoted in Borden*, 308 U.S. at 198. *Accord Germain*, 503 U.S. at 253. In this case, neither statute is offensive to the other and, because both are easily reconciled through concurrent application, effect should be given to both provisions. *Germain*, 503 U.S. at 252; *Mancari*, 417 U.S. at 551; *Borden*, 308 U.S. at 198.[76]

[76] As this Court has likewise stated, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). This preference for giving effect to congressional enactments wherever possible is thus well established. *See, e.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (statutes should each be given effect where possible); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("[W]hen there are two acts upon the same subject, the rule is to give effect to both if possible.").

In construing a statute, the Court's duty is to give meaning to the legislature's intent. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The starting point for this inquiry is, of course, the statute's language. *Germain*, 503 U.S. at 253-54 ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Mallard v. United States District Court*, 490 U.S. 296, 300 (1989); *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). When the statute's language is clear, the inquiry should end where it begins. *Germain*, 503 U.S. at 254; *Ron Pair*, 489 U.S. at 241; *United States v. Rutherford*, 442 U.S. 544, 551 (1979). "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.' " *Ron Pair*, 489 U.S. at 242 (quoting *Griffen v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *see Demarest v. Manspeaker*, 498 U.S. 184, 190-91 (1991); *Rubin v. United States*, 449 U.S. 424, 430 (1981).

In this case, not only is continued application of Section 1447(d) in the bankruptcy context demonstrably in keeping with the intent of its drafters, it is also in keeping with the general policies underlying Section 1452(b) as well as its own express language. Section 1447(d) means what it says[77] and there is no reason not to apply it in the bankruptcy context as it (and its predecessors) have been applied for over 100 years.

II. Section 1447(d) Should Be Construed in the Larger Context of the Policies and Purposes of the Bankruptcy Code.

Further support for the conclusions reached above is to be found from analysis of the issues within the larger context of the policies that animate bankruptcy administration as a

[77] *See* 1A Moore, Moore's Federal Practice *supra* ¶ 0.169[2.-1] at 688 ("Subsection (d) of § 1447 means exactly what it says.").

whole. As is clearly identified in the relevant legislative history, the drafters of the Bankruptcy Code envisioned a process that would be both expeditious and economical.[78] In light of this intent, as well as Congress' general intent to eliminate protracted litigation over where to litigate, there can be no presumption that the drafters of the Bankruptcy Code intended to permit wide-open appeals of jurisdictional remand orders.

Moreover, Sections 1447(d) and 1452(b) should be construed in light of Congress' systematic efforts in a variety of bankruptcy statutes to curtail appellate review in the context of litigation over where to litigate. In several instances, the bankruptcy statutes authorize the district courts to defer adjudication of an issue to some other tribunal.[79] In each of these instances, however, Congress has generally denied appellate review of the decision to defer in order to accomplish its objectives of judicial economy.[80] Section 1452(b) is merely one

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[78] *See, e.g., National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 517 n.1 (1984) (noting that Congress enacted the business reorganization provisions of the Bankruptcy Code "with the intention that business reorganizations should be quicker and more efficient . . .") (citing H.R. Rep. No. 95-595, p. 5 (1977)); *In re Stelweck*, 86 B.R. 833, 845 (Bankr. E.D. Pa. 1988) (stating "[o]ne of the primary concerns of this bankruptcy court is the expeditious administration and distribution of claims against the debtors' estates. In a Chapter 7 case, this means the expeditious liquidation and distribution of the estate to creditors."); *In re Interco Inc.*, 137 B.R. 993, 997 (Bankr. E.D. Mo. 1992) (relying on H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 354 (1977) and stating "Congress intended that the bankruptcy courts continue to use [11 U.S.C. § 502(c) prescribing a procedure for the estimation of contingent claims] to facilitate the speedy and expeditious resolution of claims in bankruptcy courts.").

[79] *See* 11 U.S.C. § 305(a) (1991) (permitting the bankruptcy court to abstain from hearing a bankruptcy case or suspend proceedings in a case in the interests of the parties and for other reasons); 28 U.S.C. § 1334(c)(1) (1994) (permitting the court to abstain from hearing any proceeding within a bankruptcy case on principles of comity); 28 U.S.C. § 1334(c)(2) (1994) (requiring the court to abstain under certain circumstances).

[80] *See* 11 U.S.C. § 305(c) (1991) (providing that a decision to abstain or suspend the proceedings is not reviewable on appeal); 28 U.S.C. § 1334(d) (1994) (same); 136 Cong. Rec. S17,580 (Oct. 27, 1990) *(Footnote continued)*

instance among several in which Congress has acted to prevent waste and inefficiency.[81]

Given the inherent lack of resources present in most bankruptcy cases, the administrative process in bankruptcy is particularly sensitive to issues of waste. Although Petitioner urges that appellate review of jurisdictional issues in the removal context would serve the salutary purpose of advancing the jurisprudence in this area, the context is clearly inappropriate. Questions of bankruptcy jurisdiction merit careful deliberation, but it makes no sense to suggest that Congress intended this deliberation to occur in the removal context. The weight of the law, history, logic, experience and policy stands against such a proposition.

(discussing purpose of 1990 amendments to these sections which further limited appellate review).

[81] The Court of Appeals for the Second Circuit has drawn the appropriate connection in this context:

> The Senate report accompanying § 305 states: "This section recognizes that there are cases in which it would be appropriate for the court to decline jurisdiction . . . ." S. Rep. No. 95-989 at 35, U.S. Code Cong. & Admin. News 1978, pp. 5787, 5821. Such abstention provisions in the bankruptcy context also appear at 28 U.S.C. §§ 1334(c) and 1452(b). These provisions permit a judge to refuse to assert jurisdiction over a case in favor of a proceeding in an alternate forum. Such abstention decisions are normally made at the outset of a case, before the abstaining court has acted to affect any of the parties' substantive rights and are, appropriately, unreviewable because they would place an unwarranted burden on scarce appellate resources and because the merits will be adjudicated elsewhere, from which an appeal will presumably then follow. *See* 28 U.S.C. §§ 1334(c)(2), 1452(b) (decisions to abstain not reviewable by courts of appeals by appeal or otherwise). *See also* 28 U.S.C. § 1447(d) (order remanding cases to state courts for lack of subject matter jurisdiction unreviewable).

In re Axona Int'l Credit & Commerce, Ltd., 924 F.2d 31, 35 (2d Cir. 1991). While Section 1447(d) applies to different kinds of remands than does Section 1452(b), its basic purpose is the same and it fulfills the same basic policies and goals. It would be inconsistent with the common policies and goals of these collective provisions to conclude that Section 1447(d) does not apply in bankruptcy.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

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No. 94-1530

In the Supreme Court of the United States

OCTOBER TERM, 1994

THINGS REMEMBERED, INC.,
Petitioner,

v.

ANTHONY A. PETRARCA,
Respondent.

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF IN OPPOSITION TO MOTION OF PUTATIVE *AMICUS* TO FILE BRIEF

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PETITIONER'S BRIEF IN OPPOSITION TO MOTION OF PUTATIVE *AMICUS* TO FILE BRIEF

This matter is before the Court on the motion of the Connecticut Bar Association, Commercial Law and Bankruptcy Section ("CLBS"), for leave to file a brief *amicus curiae*. Petitioner Things Remembered, Inc. opposes the motion, and requests that it be denied, because (1) CLBS has no legitimate interest in this case that suffices for *amicus* status, (2) the matters addressed in the CLBS brief have either been adequately briefed by the parties or are not relevant here, and (3) in the circumstances, permitting CLBS *amicus* status would be unduly burdensome and manifestly unfair.

1. CLBS Has No Legitimate Interest That Suffices for Amicus Status.

CLBS claims an interest in, variously, "the administration of justice generally," *CLBS Motion* at 2, or in "the administration of bankruptcy in particular," *id.*, or in "the resolution of the case at bar," *id.* at 4. Those general interests are, of course, common with those of virtually every bar association and indeed virtually every lawyer.

If the only reasons proffered by CLBS for its interest here (the administration of justice generally, etc.) suffice for *amicus* status, then any lawyer should be able to obtain *amicus* status for any case. *Amicus* status means, and should mean, something special, and Petitioner submits that more than a generalized interest in the "administration of justice generally," or even "the administration of bankruptcy in particular," should be required.

2. The Matters Addressed in the CLBS Brief Have Either Been Adequately Briefed by the Parties or Are Not Relevant Here.

The "omissions" of the parties, CLBS says, require that it brief certain "crucial issues vital to consideration of this matter." *Amicus Motion* at 3. But the parties here, whose interests are real, not academic, had every reason to brief every possible issue, if they deemed those issues relevant, important, and appropriate. If they did not brief the issues that CLBS does, it can fairly be presumed that each party, upon intense and detailed reflection and study, deemed those issues less than relevant, important, and appropriate.

Thus, for example, a good portion of Petitioner's argument is that the legislative history of the relevant statutes is scant; and that in any event it cannot be read contrary to the language of the statute. *Brief for Petitioner* at 13-18, 24-25. Respondent also discusses his view of the legislative history at the length and in the detail that he deemed appropriate. *Brief for Respondent* at 14-19, *passim*.

CLBS, however, argues that other legislative history, pre-Bankruptcy Code practice, and "the larger context of the policies that animate bankruptcy administration as a whole," *CLBS Brief* at 27-28, must be considered. That argument proceeds contrary to this Court's precedents, old and new, which hold that legislative history and policy is a secondary consideration, of little or no weight where the statutory language is plain. *Caminetti v. United States*, 242 U.S. 470, 490 (1917); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242-46 (1989) (plain meaning of a statute is

conclusive; when language is clear, pre-Bankruptcy Code practice is irrelevant). In short, the CLBS brief in no sense raises "crucial" issues and consideration of them is not only not "vital" but inappropriate. The CLBS brief does not "bring[ ] relevant matter to the attention of the Court that has not already been brought to its attention by the parties," *Sup. Ct. R.* 37.1. Rather, it will "simply burden[ ] the staff and facilities of the Court," *id.*, with extraneous materials, to no good end.

3. Permitting *Amicus* Status to CLBS in This Case Would be Unnecessarily Burdensome to the Court and Manifestly Unfair to Petitioner.

If the CLBS brief were a law review article, then the Court and the parties could address it or ignore it as they deemed best. Blessed with the imprimatur of *amicus* status, however, the brief obtains a legitimacy, in the specific context of this case, that it otherwise would not have. And if the CLBS brief is to be permitted, Petitioner has an obvious and understandable concern about addressing all of the points raised, and the authorities cited, despite Petitioner's belief that many of those points and authorities are not appropriate matters for this Court's consideration.

Consideration of the CLBS brief would be a significant additional burden to the Court and the parties. Petitioner cited 30 cases in its brief, Respondent 29 in its brief. The putative *amicus* CLBS, however, cites an astounding 71 cases -- and of those, 63 were never mentioned in either of the parties' briefs. Though Petitioner believes few of those additional cases are relevant to the issue presented, simple lawyerly prudence obliges Petitioner's

counsel to read, study, analyze, and, if necessary, address those 63 cases -- as well as the plethora of statutory provisions (29 in the CLBS brief, in contrast to 11 in Petitioner's brief and seven in Respondent's) treatises, legislative materials, and other authorities. And the misstatements of the record and status of the case in the CLBS brief (an apparent result of total lack of familiarity with the case thus far) are a matter of concern as well.

Petitioner has 20 pages, and less than 30 days, for its reply brief. A newly-opened second front, and one so far removed from the original field, is unnecessary and unfair.

Conclusion

The interest of the putative *amicus* is dubious, and its brief addresses matters neither required nor appropriate for consideration. For these reasons, the motion should be denied.

Respectfully submitted,

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